Supreme Court, U.S.
FILED

931722 APR 2 8 1994
No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JACQUELINE R. MORGAN,

Petitioner,

v.

JOHN S. FORD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

AMY S. GELLINS
Counsel of Record for Petitioner

LAW OFFICE OF AMY S. GELLINS
229 West Cloverhurst Avenue
Athens, Georgia 30605
(706) 353-1528

ALBERT M. PEARSON, III
Of Counsel to Petitioner

BUTLER, WOOTEN, OVERBY & CHEELEY
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under *Connick v. Myers*, 461 U.S. 138 (1983), does the First Amendment protect speech by an entry level public employee about sexual harassment directed at her and her co-workers where (a) she voiced the complaint in her own behalf *only* at the specific request of one of her superiors investigating sexual harassment directed at a co-worker; (b) she sought a departmental investigation into her own complaint *only* at the instigation of her superior; (c) she sought an *independent* investigation of her own complaint in accordance with established state procedure as posted at her place of employment; and (d) she never sought any job benefit other than an end to acts of sexual harassment?

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioner:

JACQUELINE R. MORGAN

Respondents:

JOHN S. FORD, TYDUS MEADOWS, CHARLES BURDEN, individually and in their official capacities as supervisors for the Georgia Department of Corrections.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. Introduction 7

II. The Eleventh Circuit Misapplied this Court's Decisions in *Givhan v. Western Line Consolidated School District; Connick v. Myers;* and *Rankin v. McPherson* 10

III. In Analyzing and Applying the *Connick v. Myers* Public Concern Standard, The Courts of Appeals Have Applied Divergent Tests and Reached Seriously Inconsistent Results 19

A. Decisions in Conflict with *Morgan* 20

B. Decisions Compatible with *Morgan* 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Cox v. Louisiana, 379 U.S. 559 (1965) 9, 18

Florida Star v. B.J.F., 491 U.S. 524 (1989) 18

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415-16 (1979) ..... *passim*

Harris v. Forklift Systems, 510 U.S. ___, 114 S.Ct. 367 (1993) 8, 27, 28

Pickering v. Board of Education, 391 U.S. 563 (1968) *passim*

Raley v. Ohio, 360 U.S. 423 (1959) 18

Rankin v. McPherson, 483 U.S. 378 (1987) *reh. denied* 483 U.S. 1056 (1987) 9, 10, 15, 16, 17

Thornhill v. Alabama, 310 U.S. 88 (1940) 21

CIRCUIT COURTS OF APPEAL CASES

Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990) (*en banc*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2796 (1991) 25

Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988) 25

Berg v. Hunter, 854 F.2d 238 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989) 25

Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985) 21

Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990) 25

TABLE OF AUTHORITIES – Continued

Page

Brown v. City of Trenton, 867 F.2d 318 (6th Cir. 1989) 24

Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1986) 23, 24

Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 657 (1991) 26, 27

Gonzales v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) 22

Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990) 25

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) 21

Kurtz v. Vickrey,, 855 F.2d 723 (11th Cir. 1988) 25

Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993) 24

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) 21

Morgan v. Ford, et al., 6 F.3d 750 (11th Cir. 1993) *passim*

O'Connor v. Steeves, et al., 994 F.2d 905 (1st Cir. 1993), *cert. denied sub nom, Town of Nahunt, Mass. v. O'Connor*, ___ U.S. ___, 114 S.Ct. 634 (1993) .. 19, 20

Peterson v. Atlanta Housing Authority, 998 F.2d 904 (11th Cir. 1993) 25

Piesco v. City of New York, Dept. of Personnel, 933 F.2d 1149 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991) 25

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) 21

TABLE OF AUTHORITIES – Continued

Page

Saulpaugh v. Monroe Community Hospital, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189 (1994) 19, 25, 26, 27

Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990) 22

Versarge v. Township of Clinton, New Jersey, 984 F.2d 1359 (3d Cir. 1993) 21

White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2d Cir. 1993), *cert. denied sub nom, White Plains Towing Corp. v. Wright*, ___ U.S. ___, 114 S.Ct. 185 (1993) 25

Wilson v. UT Health Center, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1644 (1993) 19, 21, 22

Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) 22, 23

Yatvin v. Madison Metropolitan School District, 840 F.2d 412 (7th Cir. 1988) 25

CONSTITUTIONAL PROVISIONS

First Amendment to the United States Constitution ..... *passim*

Fourteenth Amendment to the United States Constitution 8

STATUTES

18 United States Code 241 8

28 United States Code 1254 2

28 United States Code 1291 2

TABLE OF AUTHORITIES – Continued

Page

28 United States Code 1331 2

28 United States Code 1343 2

42 United States Code 1983 ..... 2, 3, 7

O.C.G.A. Section 16-5-20 8

O.C.G.A. Section 16-5-23 8

O.C.G.A. Section 16-5-41 8

O.C.G.A. Section 42-5-36 17

O.C.G.A. Section 45-19-20 *et seq.* 6, 17

OTHER AUTHORITIES:

Stephen Allred, *From Connick to Confusion, The Struggle to Define Speech on Matters of Public Concern*, 64 Ind.L.J. 43 (1988) 20

Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1 (1990) 19

Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S.Cal.L.Rev. 3 (1987) 20

No. _____

In The

Supreme Court of the United States

October Term, 1993

JACQUELINE R. MORGAN,

Petitioner,

v.

JOHN S. FORD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, JACQUELINE R. MORGAN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals for the Eleventh Circuit was entered on November 9, 1993, (A 3) and is reported at 6 F.3d 750 (11th Cir. 1993). Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*. The Eleventh Circuit Court of Appeals entered an order denying this petition on January 28, 1994. (A 1) *See* 15 F.3d 1099 (11th Cir. 1994).

JURISDICTION

This cause arose under 42 *United States Code* Section 1983. The United States District Court for the Northern District of Georgia had jurisdiction under 28 *United States Code* Sections 1331 and 1343. On August 19, 1991, the district court granted in full respondents' motion for summary judgment. The Court of Appeals for the Eleventh Circuit had jurisdiction of this cause under 28 *United States Code* Section 1291. Jurisdiction of this Court is invoked under 28 *United States Code* Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 *United States Code* Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of the section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In 1984, petitioner was hired as a Correctional Officer by the Georgia Department of Corrections. She was assigned to provide security at the Augusta Correctional and Medical Institute (ACMI) until her constructive discharge in April, 1988. Petitioner served under respondent Ford's direct supervision for two periods between 1985 and 1988. The Superintendent at ACMI was respondent Charles Burden.

Throughout petitioner's employment, Ford made sexually suggestive comments to her. For instance, Ford told her that she "had not had a real man until she had" him. Ford also said that Superintendent Burden had told him [Ford] that he "couldn't get his paycheck and his pussy in the same place," but that what Burden "did not know would not hurt him." Ford made constant requests for dates, and when refused, Ford threatened her: "There is a thin line between love and hate, and one day [Morgan] was going to realize that [she] loved" him.

In September, 1987, petitioner returned from military leave. About this time, Sheila Parrish, another female corrections officer, made sexual harassment claims against Ford. Previously, the petitioner, Parrish and other female employees had discussed Ford's sexual harassment, but had not brought it to Superintendent Burden's attention. They were extremely concerned about retaliation. Ford previously had "gotten in [Morgan's] face" and threatened that if she told of his harassment, "nobody was going to believe [her]."

After Superintendent Burden posted a bulletin "about sexual harassment in the workplace," however, Parrish overcame her reluctance to complain. The bulletin "explained what sexual harassment was, statements and innuendoes, and the number to call, which that number was the [State of Georgia's Office of] Fair Employment Practices number."

Once Parrish identified petitioner as a witness to Ford's sexual misconduct, Burden asked petitioner to meet him to discuss Ford's actions. During this meeting, Burden was immediately skeptical. Nonetheless, afterwards, Burden advised petitioner to go to the Department's Internal Affairs Section. Petitioner did so in accordance with procedures established for such matters. At no time did she seek favorable treatment such as a pay raise, transfer or a promotion. Along with Parrish and her co-workers, her goal was simply to stop Ford's sexual harassment.

Prior to her speech about Ford's misconduct, petitioner always had been viewed as a capable worker. She had never been disciplined. As soon as Ford learned of her meeting with Burden, however, petitioner's troubles got worse. Ford threatened petitioner that she "better stop this shit or else." Ford disciplined her for failing to

respond to an "officer needs assistance" call, despite witness testimony to the contrary. Ford also told other supervisors to write up petitioner whenever possible. These and other adverse actions all occurred while Internal Affairs was conducting its "investigation" of Ford.

Then, on October 9, 1987, respondent Burden joined the other supervisors in disciplining petitioner for her speech. Burden issued an official written reprimand.

> Recently, you came to my office for the purpose of providing supporting testimony to Officer Shiela [sic] Parrish's claim of sexual harassment by Lt. John Ford.
>
> During the interview with me [Supt. Burden] and with Interal [sic] Affairs Investigator Horne, you failed to establish any incident which would be considered sexual harassment either directed at you or Officer Parrish.
>
> This letter is a warning. You have made a serious charge against your supervisor but were unable to substantiate those charges. Your having done so is unprofessional, unethical, and deemed harassing in itself.
>
> While I will not tollerate [sic] sexual harassment in the workplace, I am equally protective of those wrongfully accused You are hereby warned against such future misconduct. Should misconduct of this nature reoccur disciplinary measures will be taken.

Burden also wrote a letter to Ford on the same day, clearing him of sexual harassment charges. The letter, however, cautioned Ford about his "admitted personal conversation and remarks." Although Burden admonished Ford not to "plac[e] himself in a situation that could be perceived as personal," Burden took no other action.

Burden's premise was that no sexual harassment occurred because Ford made no demands for sexual favors.

During the following month, petitioner's difficulty with Ford continued to be severe. Ford took the highly unusual step of giving petitioner an interim job rating which was the lowest she had ever gotten while at the department. Finally, after being overwhelmed with adverse actions by department officials following her allegations against Ford, petitioner filed a charge of sexual harassment and retaliation with the Office of Fair Employment Practices ("OFEP"). An independent state agency, OFEP is responsible for investigating charges of discrimination.[1] Petitioner followed the procedures outlined in the bulletin that Burden previously had posted at ACMI.

When Ford learned of the OFEP investigation, he set out to make petitioner even more miserable.[2] The cumulative effect of Ford's misconduct and the subsequent vendetta caused her depression, anxiety and intimidation. This situation, made worse by the inherent stress of working in a prison, led to her resignation in April, 1988. Sheila Parrish, too, resigned from ACMI because of the harassment and retaliatory measures.

In late August, 1989, OFEP concluded its investigation of petitioner's charge. OFEP found cause to believe that Ford had discriminated against petitioner because of

---

[1] O.C.G.A. Section 45-19-20 *et seq.*

[2] For example, Ford gave petitioner dangerous assignments for which she did not have proper certification. Petitioner also was assigned to the dorm with AIDS patients, and to the housing ward for violent inmates. Ford continued to comment about his "manhood." Petitioner's treatment was so calculatedly petty that she was denied sick leave when she was ill with the chicken pox.

her sex, and that the department had retaliated against her for opposing Ford's misconduct. Sheila Parrish received a similar finding.

Petitioner filed suit under 42 *United States Code* Section 1983, claiming that the respondents had violated her First Amendment right to freedom of speech, as applied to the states by the Fourteenth Amendment to the United States Constitution. Following discovery efforts, respondents moved for summary judgment on all claims. The district court granted the motion in full. On appeal, the Eleventh Circuit rejected petitioner's first amendment contention.[3] The Court reasoned that petitioner had not "gone public" with her speech, and that she had spoken "primarily as an employee in an effort to improve her own working conditions," and "not as a citizen on matters of public concern."

REASONS FOR GRANTING THE WRIT

I. Introduction

The Court should grant the petition because the Eleventh Circuit's decision in *Morgan* presents the "special and important reasons" needed to justify the writ of certiorari. Supreme Court Rule 10.1.

Morgan's speech regarding sexual harassment by her prison supervisor addressed a significant issue of misconduct in the workplace generally. Not only is sexual harassment a civil or tort-like wrong under both federal

---

[3] Petitioner also filed a claim against the Georgia Department of Corrections under Title VII of the Civil Rights Act of 1964, alleging sexual harassment and retaliation for opposing discriminatory practices. The Eleventh Circuit reversed the district court's grant of summary judgment on petitioner's Title VII constructive discharge claim, and that issue is not before this Court.

and Georgia law, it is misconduct often threatened or carried out by criminal means. *See, e.g.*, O.C.G.A. § 16-5-20 (simple assault); O.C.G.A. § 16-5-23 (simple battery); O.C.G.A. § 16-5-41 (false imprisonment); 18 U.S.C. § 241 (general civil rights conspiracy statute). Individual resistance to and exposure of such misconduct is therefore a matter of overriding public concern wherever it happens. Where, as here, the state is implicated in the misconduct, the vindication of a core constitutional right under the Fourteenth Amendment is at stake. *See Connick v. Myers*, 461 U.S. 138, 146 (1983); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

While this Court only recently reaffirmed its vigorous commitment to protect the victims of workplace sexual harassment, *Harris v. Forklift Systems, Inc.*, 510 U.S. ___, 114 S.Ct. 367 (1993), the Eleventh Circuit decision undermines that commitment by blunting one of the most effective tools of self-protection available to working women such as Jacqueline Morgan: freedom of speech. This right, as petitioner conceives it, includes the right to discuss with fellow employees the occurrence of illegal or criminal acts in the workplace, and the concomitant right to report such acts to persons or agencies officially designated by the state for dealing with them. The fact that this case involves allegations of sexual harassment – which were deemed credible by the only *independent* state agency which investigated them – adds a sense of urgency to petitioner's first amendment argument. That dimension, however, is not analytically critical to the first amendment principle involved.

By asserting the primacy of *Connick* at the expense of *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Eleventh Circuit's decision places an exaggerated – and extraordinarily unfair – emphasis on petitioner's failure to "go public" with her sexual harassment charges. As

will be demonstrated, that emphasis conflicts sharply with this Court's decisions in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979); *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983); and *Rankin v. McPherson*, 483 U.S. 378, 387 n.11 (1987). Supreme Court Rule 10.1(c). It also conflicts with this Court's decisions suggesting that the state cannot create a public forum and then punish those who use that forum properly to communicate about subject matter protected by the First Amendment. *See Cox v. Louisiana*, 379 U.S. 559 (1965); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

In addition, while the Eleventh Circuit in *Morgan* along with several other courts have recognized that "sexual harassment in the workplace is a matter of important social interest," some courts nevertheless seem driven to probe deeply – petitioner would say subjectively – into the alleged personal motive. Under this restrictive view of *Connick*, even if speech can fairly be described as addressing a matter of public concern, it can lose first amendment protection because a complainant has a personal interest in the subject. Thus, only the truly altruistic and the openly heroic are constitutionally worthy.[4] Again, as will be shown, consideration of this amorphous factor under the *Connick* "content, form and context" analysis has resulted in conflicting lower court decisions which distort and undermine the relationship between *Connick* and the balancing analysis

---

[4] Petitioner is mindful of the risks of issuing a challenge to respondents, but she does not believe that they can cite to a single decision of this Court where the existence of a personal stake in the outcome of a controversy has ever deprived the speaker or writer of first amendment protection. Were it not for the cases that have so misconstrued *Connick*, petitioner doubts that any such cases could be found in the lower courts as well.

called for under *Pickering*. Supreme Court Rule 10.1(a).

The intervention of this Court is urgently needed to resolve the doctrinal tension that is present in this important area of first amendment jurisprudence. As the law presently stands, no attorney – whether representing a prospective plaintiff or defendant – can explicitly advise a client about liability, settlement or the hazards of trial. As the "public concern" standard was construed by the Eleventh Circuit, vastly too much depends on the trial judge's predelictions and linguistic facility, and far too little on the concrete circumstances associated with workplace expression.

II. The Eleventh Circuit Misapplied this Court's Decision in *Givhan v. Western Line Consolidated School District; Connick v. Myers;* and *Rankin v. McPherson*

The *Morgan* panel refused to protect plaintiff's speech on a vital matter of public concern allegedly because she did not "attempt to make the concerns public":

> The speech that Morgan cites is in the form of complaints to *official bodies* – the Superintendent of ACMI, Internal Affairs, and the Office of Fair Employment Practices. She did not relate her concerns about sexual harassment to the public or attempt to involve the public in any manner. Morgan's expressions 'in no way drew the public at large or its concerns into the picture.' *Pearson v. Macon-Bibb County Hospital Authority*, 962 F.2d 1274, 1279 (11th Cir. 1992).

Morgan, 6 F.3d at 754-55 (emphasis added). In a footnote, the Eleventh Circuit tried to downplay the importance of

this consideration, describing it only as a "relevant factor." *Id.* at 754 and n.5. In actuality, however, the court gave it dispositive weight.

To pass first amendment muster as the Eleventh Circuit reads *Connick*, a public employee must pursue a course of action that will intensify workplace antagonism, will make dispute mediation far less likely and will heighten – not lessen – the employee's vulnerability under the *Pickering* balancing analysis if a lawsuit results. For many public employees, this view of *Connick* is a prescription for suffering in silence. Few will be bold enough to undertake the economic, professional and personal risks demanded by the Eleventh Circuit if the first amendment does not offer a safe harbor for the private, yet respectful, articulation of publicly important workplace grievances.

This is contrary to all of the Court's relevant precedent.

For example, in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979), this Court considered whether an employee's speech about race discrimination in public employment, made in a private meeting with her supervisor, was protected by the First Amendment. 439 U.S. at 415-16. The former Fifth Circuit Court of Appeals had concluded that "because petitioner had privately expressed her complaints and opinions to the principal, her expression was not protected. . . . " *Id.* at 413. Reversing the Fifth Circuit, this Court recognized an important point:

> . . . *Pickering*, *Perry*, and *Mount Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the

> rule to be derived from them is not dependent on that *largely coincidental fact.*

Id. at 414 (emphasis added).

Not to be overlooked in *Givhan* is the important fact that the teacher, a black woman, complained about racial discrimination in a school that had recently been subject to a district-wide desegregation order. Her complaints were not general in nature, but, in part, were related to "employment policies and practices" at the very school where she taught. She apparently believed these policies and practices to be racially discriminatory in purpose or effect. This Court was notably unconcerned with whether the plaintiff might in some way benefit personally, professionally or economically if her complaints or criticisms were acted upon favorably. This crucial aspect of *Givhan* was ignored by the Eleventh Circuit.

In *Connick v. Myers,* 461 U.S. 138, 140, 148 (1983), the first amendment issue stemmed from an office dispute concerning a transfer. Myers, an unhappy assistant faced with a transfer she did not want, drafted and circulated a questionnaire to her co-workers about the handling of transfers generally. She was discharged for insubordination. The Court's primary purpose in *Connick* was to clarify the public concern standard first enunciated in *Pickering.* No Justice in *Connick* questioned *Givhan.*

It is highly significant that on the public concern issue, this Court in *Connick* gave no weight to the fact that the plaintiff circulated the questionnaire wholly within the office and only to co-workers. If this had been a "relevant" or potentially dispositive factor, then the Court could have ruled the entire questionnaire to be unprotected expression on that basis alone and reversed without further discussion. The Court instead focused on the objective content of the questionnaire. For all but one of its questions, the objective content was enough to hold

that they "were extensions of [the plaintiff's] dispute over her transfer to another section of the criminal court." *Id.* at 149. To that extent, this Court held, they did not address a matter of "public concern" and the First Amendment did not protect them. This analysis is consistent with the objective content emphasis in *Givhan*.[5]

One question on the questionnaire at issue in *Connick*, however, did "[touch] upon" a matter of public concern.[6] The now well known question 11 asked whether assistant district attorneys "ever felt pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 149. Describing such pressure as "a coercion of belief in violation of fundamental constitutional rights," the Court found the issue to be "a matter of interest to the community upon which it is essential that public employees be able to speak out freely without

---

[5] It is important to note that in *Givhan*, the remand was not for an application of the *Pickering* balancing test. On that subject, the Court observed that under *Pickering*, private speech on a matter of public concern would be assessed in terms of the "manner, time and place in which it is delivered." *Givhan*, 439 U.S. at 415 n.4. Nothing in *Connick* altered this fundamental proposition.

[6] The use of the phrase "touched upon" was not a casual choice in *Connick*. 461 U.S. at 149. The phrase reflects what is more or less a presumption – fostering reasonable breathing space for first amendment values – that workplace speech satisfies the "public concern" standard if the speech, *even in part*, is a "matter of interest to the community" at large. *Id.* The phrase is also consistent with the observation in *Connick* that speech loses first amendment protection *only* when it refers to "matters . . . of personal interest." *Id.* at 147. The Eleventh Circuit decision below radically distorted this part of *Connick* in holding that any semblance of personal interest defeated petitioner's free speech claim.

fear of retaliatory reprisal." *Id.* Based on those considerations, the Court proceeded to undertake the "manner, place and time analysis" required under *Pickering*. *Id.* at 149-154. Again, this approach in no way departed from anything said in *Givhan;* indeed, it was undertaken in *Connick* in explicit reliance upon footnote 4 in *Givhan*. 461 U.S. at 153-54.

It is difficult to fathom how freedom from the coercion of sexual harassment in the workplace could be any less a matter of interest to the community than political coercion – particularly where state actors are culpable. On that basis alone, the petitioner would appear to have met the *Connick* public concern standard. The Eleventh Circuit opinion, however, completely ignores this aspect of *Connick* and substitutes what is essentially an *ad hoc* inquiry into whether an employee aired her concerns publicly. This inquiry is plainly and simply not a part of the public concern analysis under *Connick*. The Eleventh Circuit took a factor relevant to the *Pickering* balancing analysis (and only to that) and realigned it under the public concern test.

This approach is genuinely pernicious. The bright line for the Eleventh Circuit turns on whether a plaintiff goes public with her crusade. Granted, this bright line has the virtue of being an "objective" standard. It is simply the wrong bright line. It is far less speech protective than the "objective" test actually articulated in *Givhan* and *Connick*.

As a general proposition, the privateness of expression will work in favor of the first amendment claimant under the *Pickering* "manner, time and place" inquiry as clarified by *Givhan* and *Connick*. Yet, if the Eleventh Circuit's approach is constitutionally correct, then this same factor will weigh heavily against a first amendment claimant's effort to satisfy the public concern standard.

The Eleventh Circuit's inversion of the reasoning in *Connick* creates an unnecessary and false tension in the jurisprudence of workplace first amendment rights. Worse still, it substantially diminishes the scope of first amendment protection for public employees in a manner not contemplated by this Court in *Givhan* or *Connick*.

It remains a mystery why the Eleventh Circuit did not attach more importance to *Rankin v. McPherson*, 483 U.S. 378 (1987), which was decided four years after *Connick v. Myers*. *Rankin* seemingly put to rest the public versus private expression distinction. An employee of a county constable's office, upon hearing of the unsuccessful attempt to assassinate then-President Reagan, stated to her boyfriend: " . . . if they go for him again, I hope they get him." This remark was overheard by another employee who reported the remark to the constable. The constable called the plaintiff to his office, confirmed that she had made the remark, and fired her. *Rankin*, 483 U.S. at 381-382.

The *Rankin* Court specifically rejected the Government's contention that the private nature of the statement vitiated "the status of the statement as addressing a matter of public concern." *Id.* at 387, n.11. As the Court observed:

> Vigilance is necessary to ensure that public employees do not use authority over employees to silence discourse, not because it hampers public functions, but simply because superiors disagree with the content of employees' speech.

Id. at 384. The Court held that the content of the statement, made during a discussion of Reagan Administration policies, was a matter of public concern. From there, the Court proceeded to the balancing analysis required by *Pickering* and upheld the first amendment claim in all respects. *Id.* at 388-392.

All Justices in *Rankin* appeared to agree that an objective standard determines whether speech is a matter of public concern. The four *Rankin* dissenters, led by Justice Scalia, opposed what they perceived to be the majority's blurring of objective and subjective factors under *Connick*. Specifically, Justice Scalia strongly chided the majority for impermissibly injecting the motive of the speaker into first amendment analysis:

> [McPherson's political] criticisms merely reveal[ed] the speaker's motive for expressing the desire that the next attempt on the President succeed, in the same way that a political assassin's remarks to his victim before pulling the trigger might reveal a motive for the crime.

483 U.S. 396-397. In Justice Scalia's view, the motive for speech must be kept distinct from its objective content which, in *Rankin*, pointed toward low value, unprotected speech – at least in the public workplace. In short, a good motive cannot save objectively unprotected speech from sanction. Petitioner suggests that the converse is equally true: a bad motive cannot be used to deprive objectively protected speech from full first amendment protection.[7] This proposition is arguably well settled by the Court's workplace free speech decisions.

Yet, the Eleventh Circuit's use of personal motive to hold against petitioner below is a clear inversion of the first amendment methodology of *Givhan*, *Connick* and

---

[7] In this regard, the Eleventh Circuit begrudgingly acknowledged that when petitioner spoke on behalf of a co-worker, the speech contained a "public concern aspect." *Morgan v. Ford*, 6 F.2d 750, 755 (11th Cir. 1993). This part of petitioner's speech simply was not enough to make it the "primary" purpose. Petitioner submits that there is no basis in this Court's decisions for the "primary" purpose corollary to the public concern standard.

Rankin. These decisions establish that when speaking on a matter of public concern, the speaker's forum is immaterial to the public concern inquiry. Despite this precedent, the *Morgan* panel held that while the petitioner's motives were pure, they were not pure enough for first amendment protection, because petitioner did not "attempt to involve the public in any manner."[8] This statement not only misstates the law, it is factually erroneous as well.

Petitioner indeed made her sexual harassment concerns public. She did so in a manner directed by the state and did so precisely in accordance with those directives. More important, these procedures were established by the state for the very reasons that underlie this Court's balancing analysis under *Pickering:* to promote efficiency and to minimize disruption in the workplace. First, at the specific request of the prison superintendent who was investigating a co-worker's sexual harassment complaint, petitioner told him what she knew. Then, at the superintendent's specific suggestion, petitioner took her own sexual harassment complaints to the Internal Affairs Section.[9] Finally, exactly in accordance with the bulletin posted at ACMI, she filed under oath a charge of discrimination and retaliation with the official state Fair Employment Practices agency.[10]

In this respect, petitioner went public with her sexual harassment concerns in three distinct fora made available by the state for the purpose of hearing discrimination complaints. The notion of having to go public to satisfy the public concern standard represents a comic book view of the First Amendment. For reasons understandable to

---

[8] *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir.1993).

[9] *See* O.C.G.A. Section 42-5-36.

[10] *See* O.C.G.A. Section 45-19-20 *et seq.*

anyone who has ever been in a subordinate position in the workplace (which includes just about everybody), petitioner took the procedurally approved course. Yet, having extended this invitation to petitioner and opened the fora to hear her complaints, the state now denies that the subject matter of petitioner's complaints is a matter of public concern.

Contrary to what the Eleventh Circuit held, the state cannot entice and punish at the same time. For example, in *Cox v. Louisiana*, 379 U.S. 559, 569-571 (1965), the appellant was convicted under a Louisiana statute making it a misdemeanor to picket or parade "in or near" a courthouse. Law enforcement officials at the scene told civil rights demonstrators that they could demonstrate across the street from the courthouse. Relying on this, the demonstrators assumed that they would not be in violation of the statute. They were wrong. The Supreme Court reversed appellant's conviction on the ground that to do otherwise "would be to sanction an indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Id.* at 571 *quoting Raley v. Ohio*, 360 U.S. 423, 426 (1959). The rationale of *Cox v. Louisiana* applies to petitioner's case.

Much more recently, the Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), overturned an invasion of privacy judgment against a newspaper for publishing the name of a rape victim in violation of a Florida criminal statute. *Id.* at 527-528. One of the major factors in the Court's reasoning was the police department's distribution of a press release naming the victim. In reliance on that, the newspaper reported the name. This Court was greatly concerned about the state placing information in

the public domain and then permitting an invasion of privacy lawsuit against a newspaper for reporting public domain information. *Id.* at 535-536. As suggested in *Cox*, the state's conduct smacked of entrapment.

Although the opportunity to grant the writ on the private speech/personal interest issue has presented itself in several recent cases, this Court has passed each time. *See, e.g., Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189 (1994); *O'Connor v. Steeves, et al.*, 994 F.2d 905 (1st Cir. 1993), *cert. denied, sub. nom Town of Nahunt, Mass. v. O'Connor*, ___ U.S. ___, 114 S.Ct. 684 (1993); *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1644 (1993). The circuit courts are now in fundamental conflict on *Connick* and the probability of a shift toward greater doctrinal uniformity is remote. This Court's detachment has contributed to the disarray. Continued hesitation will only make matters worse.

III. In Analyzing and Applying the *Connick v. Myers* Public Concern Standard, The Circuit Courts Have Applied Divergent Tests and Reached Seriously Inconsistent Results

Many circuit courts recognize that speech regarding workplace sexual harassment is a matter of public concern; yet, these courts have reached conflicting decisions on whether speech is constitutionally protected based upon the weight given to the plaintiff's "motive" in speaking.[11]

---

[11] Several legal scholars have addressed this conflict, and have emphasized the need for clarification in order to vindicate free speech rights on matters of public concern. *See, e.g.*, Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1,

A. Decisions in Conflict with *Morgan*

There are numerous circuit court decisions in conflict with the Eleventh Circuit's holding in *Morgan*. The Fifth and the Tenth Circuits provide perhaps the leading examples.[12]

36-39 and nn.210-225 (1990) ("*Connick* seems to require that in order to secure the status of speech on matters of public concern, grievances be purged of the taint of self-interest, and be distilled into a generalized political or social commentary or demand for reform . . . The *Connick* formula systematically denigrates the importance of the particular grievance to generating public concern over an issue. As such, it deprives each individual self-interested speaker of the very legal protections she may need in order to discover and join those who share her concerns . . . "); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S.Cal.L.Rev. 3, 20-24 and nn.95, 100-104 (1987) (" . . . In numerous post-*Connick* cases, the lower courts have concluded that the employee speech in question was personal and therefore not protected. [citations omitted] . . . The message of the case law on public employee speech is disconcerting . . . The decisions encourage workers to carry their grievances to outside fora – to newspaper, public meetings, television, or other similar avenues – even though publicity could fan into flames an ember that might have been doused quickly and quietly within the workplace. The decisions also discourage workers from speaking up on the topics, and in the manner, most likely to occur to them: on internal, work-related problems expressed to a co-worker or supervisor during the work days . . . ;") *see also* Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind.L.J. 43 (1988).

[12] The Eleventh Circuit's holding in *Morgan* concerning "motive" in speaking is at odds with the analytical approach generally taken by the Courts of Appeals for the First, Third, Fifth, Ninth, Tenth and District of Columbia Circuits. **First Circuit:** *O'Connor v. Steeves, et al.*, 994 F.2d 905, 913-915 and nn.4-6 (1st Cir. 1993), *cert. denied, sub nom Town of Nahunt, Mass v. O'Connor*, ___ U.S. ___, 114 S.Ct. 634 (1993) (Court addressed the

In *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1644 (1993), a case very similar factually to *Morgan*, the Fifth Circuit Court of Appeals reached the opposite result. Wilson was an officer with the University of Texas Health Center's (UTHC) police force. She alleged that officials demoted and discharged her for reporting sexual harassment within the health center's police force against herself and other co-employees. 973 F.2d at 1265-1266. At trial, the

---

"threshhold" issue under *Connick* of whether O'Connor's allegation of official misconduct against Steeves, an elected official, was speech on a matter of public concern; discussed the varying approaches taken by other Courts of Appeals; and found that its precedent supported the "content-based" approach, and where an employee's speech involved an "inherent matter of public concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the form and context of the expression"); and *Brasslett v. Cota*, 761 F.2d 827, 844 n.14 (1st Cir. 1985); **Third Circuit:** *Rode v. Dellarciprete*, 845 F.2d 1195, 1201-1202 (3d Cir. 1988) (" . . . Dismissing Rode's speech about racial discrimination as unprotected merely because she had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected public employee from speaking out . . . "); *Versarge v. Township of Clinton New Jersey*, 984 F.2d 1339, 1365 (3d Cir. 1993) ("the law in this circuit is that motivation is merely one factor to be considered . . . in assessing the character of the [employee's] speech"); **Ninth Circuit:** *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of first amendment protection) *quoting Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); **District of Columbia Circuit:** *Hall v. Ford*, 856 F.2d 255, 260 (D.C. Cir. 1988) (speech about alleged violations of NCAA and University rules may be protected even if the speech reflected "job-related disagreements.")

district court ruled that Wilson's speech did not involve a matter of public concern. *Id.* at 1268.

The Fifth Circuit reversed and remanded for a jury trial.[13] The court reasoned:

> The content of Wilson's speech – reports of sexual harassment perpetrated on her and other women at UTHC – is of great public concern. *Cf. Connick*, 461 U.S. at 148, n.8 (plaintiff's constitutional 'right to protest racial discrimination [is] a matter inherently of public concern,' *citing Givhan v. Western Consolidated School District*, 439 U.S. 410, 415-16 (1979) . . .
>
> *Connick* 'hold[s] only that when a public employee speaks *not* as a citizen upon matters of public concern, but *instead* as an employee upon matters of personal interest,' the First Amendment does not protect the employee from disciplines for speaking 461 U.S. at 147 (emphasis added). The words 'not' and 'instead' in this key statement can only mean that the Court removed from First Amendment protection only that speech that is made only as an employee, and left intact protection for speech that is made both as an employee and as a citizen.

Wilson, 973 F.2d at 1269-1270 (emphasis in original).[14]

In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), the court reviewed a police officer's claim that he was fired for writing the State Attorney General seeking an

---

[13] The Fifth Circuit's analysis in *Wilson* is consistent with its earlier decisions. *See, e.g., Thompson v. City of Starkville*, 901 F.2d 456, 465 (5th Cir. 1990) and *Gonzales v. Benavides*, 774 F.2d 1295, 1300-01 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

[14] The *Wilson* Court also recognized that Wilson's speech was protected under *Givhan* even though she had chosen an "internal forum" in which to express her concerns. *Id. citing Givhan*, 439 U.S. at 415-16 (other citation omitted). This portion of the opinion, too, stands in stark contrast to *Morgan*.

investigation. Wulf's letter had included allegations of misuse and misappropriation of public funds and sexual harassment of a female officer. *Id.* at 857. The *Wulf* court concluded "that the content of Wulf's letter strongly supports a finding of public concern," and that "the form and context of the letter also support such a finding." *Id.* at 860, n.26. It specifically rejected the claim that the letter was a "mere extension of a personnel dispute" and that the context of Wulf's speech showed that it "arose out of Wulf's displeasure at being transferred . . . and was the culmination of a personal vendetta by Wulf against [defendant] LaMunyon." *Id.*

Finding that the speech addressed a matter of public concern, the *Wulf* court noted:

> [E]ven the questionnaire in *Connick*, which the Court viewed as simply an extension of a personal dispute between employer and employee, contained one matter of public concern. Similarly, Wulf's letter, while arguably linked to some degree to his personal dispute with LaMunyon and to his dissatisfaction with his transfer to the Records Department which he viewed as retaliatory, contains allegations of public concern. *Id.* at 860.

B. Decisions Compatible with *Morgan*

In focusing upon the "point" of Morgan's speech instead of the "content, form and context, as revealed by the whole record," the Eleventh Circuit embraced reasoning that generally has been applied by the Courts of Appeals for the Second Circuit, the Sixth Circuit, and most notably, the Seventh Circuit. *See Morgan*, 6 F.3d at 754-755 *citing Callaway v. Hafeman*, 832 F.2d 414, 417 (7th

Cir. 1986) and *Marshall v. Allen*, 984 F.2d 787, 796 (7th Cir. 1993).[15]

In *Callaway v. Hafeman*, 832 F.2d 414 (7th Cir. 1987), the Seventh Circuit denied first amendment protection to speech about sexual harassment that the plaintiff personally had experienced. It defined the standard as follows:

> While it is undoubtedly true that incidences of sexual harassment in [public employment] are inherently matters of public concern, the *Connick* 'test requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?' *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (other citations omitted).

Callaway, 832 F.2d at 417. After purporting to review the content, form and context of Callaway's statements, the Seventh Circuit concluded that her concern was "personal, not public." *Id.* The court reasoned that Calloway had always tried to keep her complaints confidential, and that her communications were made in a context relating to the resolution of a "personal dispute." *Id.*

Although the Seventh Circuit usually has viewed the factor of a "personal stake in the outcome" as

---

[15] *See also Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989) (court denied first amendment protection to an employee's letter of protest to his police chief about a perceived lack of support of the emergency response team, advising that when applying *Connick's* factors of content, form and context, if the Court found that the "employee's personal interest *qua* employee predominates over any interest he might have as a member of the general public, we are not to intercede.")

determinative,[16] there is evidence of intra-circuit conflict among its decisions. Some Seventh Circuit cases reject undue emphasis on motive under *Connick*, and instead, focus upon the objective content of the speech. *See, e.g., Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) *(en banc), cert. denied*, ___ U.S. ___, 111 S.Ct. 2796 (1991); *Breuer v. Hart*, 909 F.2d 1035, 1038-1039 (7th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1264 (7th Cir. 1988); *Berg v. Hunter*, 854 F.2d 238, 242-243 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). In this respect, the Eleventh and Seventh Circuits are similar, although the intra-circuit conflict parallel is no doubt unintentional. *See, e.g., Peterson v. Atlanta Housing Authority*, 998 F.2d 904, 915-916 (11th Cir. 1993); *Kurtz v. Vickrey*, 855 F.2d 723, 727-729 (11th Cir. 1988).

In *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 142 (2d Cir. 1993), the Court denied first amendment protection to a hospital employee who claimed her discharge was for complaining about a supervisor's sexual harassment.[17] The *Saulpaugh* court stated that if the

---

[16] *See, e.g., Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 420 (7th Cir. 1988); *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990).

[17] *See also White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 184 (1993) ("Even as to an issue that could arguably be viewed as a matter of public concern, if the employee has raised the issue solely in order to further his own employment interest, his First Amendment right to comment on that issue is entitled to little weight in the [*Pickering*] balancing analysis"); *Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149, 1157 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991) (" . . . It also is apparent that this case can be readily distinguished from those cases where a disgruntled employee voluntarily comments on an employment-related matter out of a personal interest") (citations omitted).

plaintiff's complaints had been about "system-wide discrimination, they would have unquestionably involved a matter of public concern." *Id.*

> Here, however, there has been no violation of the First Amendment because Saulpaugh's complaints were 'personal in nature and generally related to her own situation.'. . . . Although evidence was subsequently uncovered that Rosemond had also sexually harassed a prior employee, Saulpaugh's complaints, like those in *Ezekwo* and *Yatvin*, were motivated by and dealt with her individual employment situation. (citations omitted).

Saulpaugh, 4 F.3d at 142-143.

Significantly, however, Chief Judge Newman wrote separately to state his views that the "Circuit's law concerning the First Amendment rights of public employees has evolved too hastily and too narrowly . . . " *Id.* at 146.

> [The question arises] whether the speech of a public employee must be placed in either the 'public concern' or the 'personal interest' categories, or whether, in an appropriate case, it may be placed in both categories, drawing First Amendment protection to the extent that the speech is a matter of 'public concern.' The Fifth Circuit has ruled that a public employee's speech may fall into both of the *Connick* categories. In *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992) *cert. denied* ___ U.S. ___, 113 S.Ct. 1644 (1993), the Court said that the Supreme Court in *Connick* had 'removed from First Amendment protection only that speech that is made only as an employee and left intact protection for speech that is made both as an employee and as a citizen.' *Id.* at 1269. . . .
>
> I think the Fifth Circuit's reading of *Connick* is correct. In describing the category of 'private interest' matters that do not receive First

> Amendment protection, the Supreme Court was careful to limit its ruling to 'ordinary dismissals from government service which violate no . . . applicable statute.' *Connick*, 461 U.S. at 146. A dismissal in violation of Title VII is a matter of 'public concern,' and an employee who protests that her discharge violates Title VII is speaking about a matter of 'public concern' and a matter of 'private interest.'
>
> Nevertheless, I am obliged to acknowledge that our Circuit has adopted the position taken by the Seventh Circuit, albeit without explicitly recognizing the two lines of conflicting authority, much less articulating a basis for preferring the Seventh Circuit's conclusion. *See Ezekwo v. NYC Health & Hospitals Corp.*, 940 F.2d at 780-81. . . .
>
> Though regretting our narrow view of First Amendment protection, I am bound by *Ezekwo* and therefore concur in the Court's opinion.

Saulpaugh, 4 F.3d at 146-147 (Newman, Chief Judge, concurring).

CONCLUSION

Sexual harassment in the workplace is a pervasive problem, which affects and undermines the efficiency of businesses everywhere and the services that they provide. In *Harris v. Forklift Systems*, 510 U.S. ___, 114 S.Ct. 367 (1993), this Court forcefully stated:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that

> it created a work environment abusive to employees, because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality.

114 S.Ct. at 370-371.

Despite the Supreme Court's message in *Harris*, the opinion in *Morgan* – issued, ironically, on the very same day – will have the opposite effect. It will be cited to claim that courts should not protect plaintiffs if they oppose sexual harassment but do not go "public." Also, by refusing to protect speech made [only] to "official bodies," the opinion will discourage employees from expressing their concerns internally, thereby denying the employer a chance to address the misconduct before the allegations are broadcast – which then may cause even greater problems. Indeed, at a time when courts are stressing the need for alternative dispute resolution, *Morgan* will compel the contrary, undesirable result.

Morgan further overlooks the reality of the workplace, and the certain conclusion that most employees will simply remain silent about official misconduct or breach of duty rather than "rock the boat." This holding surely will keep employees from speaking about matters of public import – except for the few who are bold enough or financially secure enough to "go public," and inevitably, to risk their jobs in order to tell the truth for the greater good.

The notion that personal motive might despoil the first amendment claim in *Morgan* is especially unfair. The petitioner is truly an average working woman, drawing a paycheck and doing what she can to make ends meet. She sought neither favors nor compensation when encouraged to air her complaint. She sought only to end illegal and unconscionable actions by a state official. She followed the procedures that the state created for hearing

sex discrimination complaints. She did everything right and yet she was punished and ultimately, forced to give up her chosen career.

The Eleventh Circuit's trivialization of the First Amendment in *Morgan* is especially ironic. Petitioner was an employee of the Georgia Department of Corrections. It is a state agency that has been devastated by a scandal involving not only the sexual harassment of female workers but also female inmates.[18] Criminal prosecutions

---

[18] The media has covered extensively the sex scandal within the Department of Corrections. *See e.g.*, **Atlanta Journal and Constitution:** "Prison Sex Scandal Won't Fade Away; Costs Still Climb, Even as Contracts Inked for Movies," March 14, 1993 ("[15 people] await trial on felony charges ranging from sexual assault . . . to rape and aggravated sodomy. A warden was fired and another demoted. 12 people have been transferred, suspended, fired or quit . . . Corrections Department officials have waged a vigorous public relations campaign with the media . . . But as much as they would like to, corrections officials cannot readily lay the scandal to rest . . . So far, the case has cost taxpayers about $5 million in attorneys' fees, renovation and new personnel and programs. The price is likely to increase by millions more as the case progresses to criminal and civil trials. "There was open hostility toward and abuse of women, both inmates and employees, condoned and participated in by top officials," said Kathie McClure, an attorney for an inmate. "The inmates were treated like animals. The female employees were treated like second-class citizens." But the department says if that was the case, it was allowed to happen because no one knew . . . ;" *see also* **Chicago Tribune,** "Assault Charge: Inmates Accuse Prison Workers of Misconduct," May 24, 1992; and **The Dallas Morning News,** "Female Inmates' Sex-Abuse Suit Rocks Georgia's Prison System," March 12, 1994 (" . . . At the state's request, the Justice Department also has begun investigating possible civil rights violations . . . Investigators from an all-male internal affairs unit looked into reported liaisons between inmates and prison staffers. But none of the reports was ever ruled to be confirmed . . . Under pressure

and civil suits have resulted. Employees have been fired and demoted. The Department now is doing much soul searching. If the first amendment right of employees to speak out on this matter had been protected, then maybe this "culture of abuse" in the Department of Corrections' workplaces would have been challenged sooner and more successfully.

Petitioner asks the Court to bring its wisdom to bear on this problem. *Connick* has become a favored trial court tool for disposing of cases easily and quickly on summary judgment. This phenomenon is far removed from the guiding rationale behind that decision.

For the reasons set forth, petitioner asks this Court to grant the writ and to reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

AMY S. GELLINS
Counsel of Record for Petitioner

LAW OFFICE OF AMY S. GELLINS
229 West Cloverhurst Avenue
Athens, Georgia 30605
(706) 353-1528

ALBERT M. PEARSON, III
Of Counsel to Petitioner

BUTLER, WOOTEN, OVERBY
& CHEELEY
2719 Buford Highway
Atlanta, Georgia 30324
(404) 321-1700

---

from lawyers, state corrections officials appointed a special investigator to check into the allegations. The findings astounded even the attorneys for the women. 'We found that many or most of the women were probably telling the truth . . . ' said Andie Moss, Deputy Commissioner."

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8816

JACQUELINE R. MORGAN,

Plaintiff-Appellant,

versus

JOHN FORD, Individually and in
his official capacity as an officer
of the Georgia Department of Corrections,
et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Filed Jan. 28, 1994)

Before: TJOFLAT, Chief Judge, HATCHETT and BIRCH, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

Jacqueline R. MORGAN,
Plaintiff-Appellant,

v.

John FORD, Individually and in his official capacity as an officer of the Georgia Department of Corrections, Tydus Meadows, Individually and in his official capacity as an officer of the Georgia Department of Corrections; Chuck Burton, Individually and in his official capacity as an officer of the Georgia Department of Corrections; Robert Whitmore, in his official capacity as Commissioner of the Georgia Department of Corrections and Georgia Department of Corrections, Defendants-Appellees.

David Evans, etc., Defendant.

No. 91-8816.

United States Court of Appeals,
Eleventh Circuit.

Nov. 9, 1993.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, HATCHETT and BIRCH, Circuit Judges.

PER CURIAM:

In this case, Jacqueline Morgan claims that she left her job with the Georgia Department of Corrections because three of her supervisors subjected her to sexual harassment in the workplace. She seeks an injunctive

order, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988), requiring the Department of Corrections to reinstate her to her position, with back pay and fringe benefits. Morgan also claims that when she exercised her First Amendment right of free speech and complained about the sexual harassment, these supervisors retaliated against her. Accordingly, she seeks compensatory and punitive damages against them, under 42 U.S.C. § 1983 (1988).

The district court found no merit in any of Morgan's claims, and therefore granted summary judgment against her. We agree with the district court's disposition of Morgan's section 1983 claims against the supervisors, and thus affirm that disposition. We vacate, however, the judgment for the Department of Corrections, and remand Morgan's case for reinstatement for further proceedings, because a material issue of fact remains to be litigated.

I.

Jacqueline Morgan went to work for the Georgia Department of Corrections (the Department) in 1984. The Department assigned her to the Augusta Correctional Medical Institute (ACMI); her position was Correctional Officer I (COI). Lieutenant John Ford, one of the defendants sued in this case, was her immediate supervisor. He supervised Morgan for two periods during her employment at ACMI: for her initial six months and for a time in 1987.

Soon after Morgan came to work, Ford directed Correctional Officer Kenneth Carswell to ask Morgan if she would be interested in going on a date with Ford. Morgan

told Carswell that she was not interested in seeing Ford socially.

Upon receiving this response, Ford told Morgan that she "had not had a real man until she had him." Ford made statements to this effect to Morgan, and to other female employees throughout Morgan's employment at ACMI. After telling Morgan "that she had not had a real man until she had him," Ford began to spend long periods – up to three or fours hours at a time – at Morgan's work station. While there, he would scrutinize the minutiae of Morgan's work, and engage her in unwanted conversation. During one of these episodes, Ford boasted that Charles Burden, ACMI's Superintendent and another defendant in this case, had told him that "[Ford] could not get his pussy and his paycheck in the same place," but that "what [Burden] doesn't know won't hurt him." On occasions, Ford remarked that "there is a thin line between love and hate and someday [Morgan] will realize that [she] love[s] [Ford]," or words to that effect. Once, while on her way to a party for ACMI employees, Ford told Morgan that she looked good in her dress and that he "could imagine her without it."

Ford's conduct troubled Morgan. She claims that after sharing her concerns about Ford with a fellow officer one evening at work, she discovered that Ford had electronically monitored her conversation.

After Morgan had been on the job for six months, Ford changed shifts and no longer supervised Morgan's work. Although they saw each other infrequently, Ford's troubling behavior did not cease; he continued to comment on his virtues.

In 1987, Morgan left ACMI for several weeks to go on military leave. Upon her return, Ford again served as her supervisor. At her annual evaluation, in June of 1987, Ford rated her 3.4 on a 5-point scale.

In September 1987, one of Morgan's co-workers, Sheila Parrish, lodged a sexual harassment complaint against Ford with Superintendent Burden. In her complaint, Parrish cited Ford's unwanted attentions and habitual sexually suggestive comments. Parrish identified Morgan as a witness who could substantiate her allegations.

At Burden's request, Morgan met with Burden to discuss Ford's actions toward Parrish. At that meeting, Morgan told Burden about Ford's behavior – toward her as well as Parrish. Burden suggested that Morgan take her charges to the Department's Internal Affairs Division, which she promptly did.

Ford soon learned of Morgan's meeting with Burden, and within two weeks he took action against her. Ford disciplined Morgan for failing to respond to an "officer needs assistance" call, although a witness testified to the contrary. Ford then instructed lieutenants with supervisory authority over Morgan to watch her closely and to write her up for the smallest of infractions. Shortly thereafter, Lieutenant Tydus Meadows, another defendant before us, disciplined Morgan for being rude to a visitor; he did so in the face of a witness' testimony that she had not been rude.

In early October 1987, Internal Affairs completed its investigation and sent a report thereof to Burden. After reading the report, Burden concluded that Morgan had

not been sexually harassed. On October 9, 1987, he informed Morgan in writing that she had not established her claims of sexual harassment and admonished her against bringing false claims against her supervisors. He warned her that she would be disciplined for any further "misconduct." Burden also wrote to Ford. He told Ford that although there was no finding of sexual harassment, he should not "plac[e himself] in a position which could be construed as personal." Burden took no other action in the matter.

On November 3, 1987, Ford gave Morgan an interim rating of 2.6 on a scale of 5, significantly lower than the rating he had given her in June. An interim review is an extraordinary procedure which is used to register a supervisor's strong impressions of an employee's performance. Ford gave Morgan a 2.6 rating because, he said, she had exhibited a poor attitude and was uncooperative. On November 9, 1987, Morgan filed a sexual harassment charge against Ford with the Georgia Office of Fair Employment Practices. When notified of the charge, Ford told Morgan to drop it because "no one would believe. her." Immediately thereafter, Morgan found herself reassigned to the more distasteful duties around the compound. Ford assigned Morgan to the guard tower although she did not have a proper weapons certification, to the unit for AIDS patients, and to the housing ward for violent inmates.

Ford's supervision of Morgan ended in November 1987. Although Ford no longer had direct control over her, Morgan claims that he continued to engage other officers to make her working environment unpleasant. In April 1988, Morgan resigned. In August 1989, the Office

of Fair Employment Practices issued a finding of reasonable cause to believe that the Department had discriminated against Morgan and had retaliated against her for opposing perceived discriminatory practices.

On October 6, 1989, Morgan brought this suit against Ford, Meadows, and Burden in their individual and official capacities,[1] seeking compensatory and punitive damages, under 42 U.S.C § 1983,[2] for retaliating against her for complaining, purportedly in the exercise of her First Amendment right of free speech, about sexual harassment against her in the workplace. On January 30, 1990, Morgan filed an Amended Complaint adding Robert Whitworth, in his official capacity as Commissioner of the Georgia Department of Corrections, as a party defendant, and seeking an order requiring Whitworth to reinstate her to the job she left because of the harassment she had received at the hands of Ford, Meadows and Burden. On April 12, 1990 Morgan again amended her Complaint,

---

[1] Morgan also sued David Evans in his official capacity as Commissioner of the Georgia Department of Corrections. She dropped him from the case when Robert Whitworth assumed that position.

[2] Section 1983 provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within, the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1983.

adding the Department of Corrections as a party defendant and seeking an order, under Title VII, requiring the Department to reinstate her to her position.[3]

After the parties joined issue and engaged in considerable discovery, the district court granted the defendants summary judgment. Morgan now appeals.

II.

In the discussion that follows, we first address Morgan's First Amendment claims for damages against Ford, Meadows and Burden. We then turn to Morgan's Title VII claim.

A.

Morgan claims that Ford, Meadows and Burden abridged her First Amendment right to free speech after she complained to Burden,[4] the Internal Affairs Division, and the Georgia Office of Fair Employment Practices that she was being harassed in the workplace. We agree with the district court that Morgan suffered no constitutional deprivation.

---

[3] Morgan also seeks such relief from Whitworth. Because, for purposes of this Title VII claim, Whitworth and the Department are essentially one and the same, we refer to them hereafter collectively as the "Department."

[4] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . . " U.S. Const. amend. I. This right was made applicable to the states by the Fourteenth Amendment, *Everson v. Board of Educ.*, 330 U.S. 1, 8, 67 S.Ct. 504, 507-08, 91 L.Ed. 711 (1947).

A state may not demote or discharge a public employee in retaliation for protected speech. *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir.1989) (citing *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). This circuit has developed a four-part test to determine whether an employee suffered such retaliation. First, a court must determine "whether the employee's speech may be 'fairly characterized as constituting speech on a matter of public concern.' " *Bryson*, 888 F.2d at 1565 (quoting *Rankin*, 483 U.S. at 384, 107 S.Ct. at 2896-97 (citation omitted)). *See also Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir.1988); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). If so, the district court must "weigh[ ] the employee's first amendment interests against 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* (citing *Pickering v. Board of Educ.*, 31 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968)). Should the employee prevail on the balancing test, "the fact-finder determines whether the employee's speech played a 'substantial part' in the government's decision to demote or discharge the employee." *Id.* (citing *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)). Finally, if the employee shows that the speech was a substantial motivating factor in the employment decision, "the state must prove by a preponderance of the evidence that 'it would have reached the same decision . . . even in the absence of the protected conduct.' " *Id.* at 1566 (quoting *Mount Healthy*, 429 U.S. at 286, 97 S.Ct. at 576).

Applying this four-part test, we first examine whether Morgan's speech related to a matter of "public concern."

Morgan contends that her speech – the complaints of sexual harassment – involves a public concern, because sexual harassment in the workplace is a matter of vital social interest.

To fall within the realm of the "public concern," an employee's speech must "relat[e] to a [ ] matter of political, social, or other concern to the community." *Connick v. Meyers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). Absent extraordinary circumstances, however, First Amendment protection remains unavailable when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . ." *Id.* at 147, 103 S.Ct. at 1690. A court must therefore discern the purpose of the employee's speech – that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee. *Id.* at 146, 103 S.Ct. at 1690; *Kurtz*, 855 F.2d at 730; *Ferrara*, 781 F.2d at 1515-16. To accomplish this, a court considers "the content, form and context of a given statement, as revealed by the whole record." *Deremo v. Watkins*, 939 F.2d 908, 910 (11th Cir.1991) (citing *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690). A court may consider the employee's attempts to make the concerns public,[5] along

---

[5] We understand that a court cannot determine that an utterance is not a matter of public concern *solely* because the employee does not air the concerns to the public. *Deremo*, 939 F.2d at 911 n. 3 (citing *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir.1988)). The employee's attempt at public disclosure nonetheless remains a relevant factor in determining whether the speech was a matter of public concern. *Id.*; *see also Kurtz*, 855 F.2d at 729; *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986).

with "the employee's motivation in speaking." *Id.* at 911 (citations omitted).

While we heartily agree with Morgan that sexual harassment in the workplace is a matter of important social interest, "the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment." *Kurtz*, 855 F.2d at 727 (quoting *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir.1986)). Rather, we must determine whether the purpose of Morgan's speech was to raise issues of public concern, on the one hand, or to further her own private interest, on the other. *See Deremo*, 939 F.2d at 912 (employees' request for compensation for remaining silent about sexual harassment did not constitute a matter of public concern); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir.1987) (employee's private complaints of sexual harassment were not matter of public concern); *see also Marshall v. Allen*, 984 F.2d 787, 796 (7th Cir. 1993) (male co-worker's verbal support for victims of sexual harassment constituted speech touching upon a public concern).

In the case at hand, Morgan's speech largely focused upon how Ford behaved toward her and how that conduct affected her work. The speech that Morgan cites is in the form of complaints to official bodies – the Superintendent of ACMI, Internal Affairs, and the Office of Fair Employment Practices. She did not relate her concerns about sexual harassment to the public[6] or attempt to

---

[6] *See Martinez v. City of Opa-Locka*, 971 F.2d 708, 710 (11th Cir.1992) (providing testimony regarding the public disposition

involve the public in any manner. Morgan's expressions "in no way dr[ew] the public at large or its concerns into the picture." *Pearson v. Macon Bibb County Hosp. Auth.*, 952 F.2d 1274, 1279 (11th Cir.1992). The record shows that Morgan's speech was driven by her own entirely rational self-interest in improving the conditions of her employment. Her complaints about Ford's behavior, as serious as they were, centered around her private matters not matters of social interest. As an employee grievance, Morgan's speech was not a matter of public concern. *See Connick*, 461 U.S. at 146-47, 103 S.Ct. at 1690; *Ferrara*, 781 F.2d at 1512; *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984).[7]

That Morgan spoke on behalf of Sheila Parrish regarding Ford's harassing behavior does not change the

---

of money); *Stough v. Gallagher*, 967 F.2d 1523, 1524, 1528 (11th Cir.1992) (campaigning publicly for sheriff candidate); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1506 (11th Cir.1990) (expressing opposition to tax referendum at Superintendent's meeting); *Williams v. Roberts*, 904 F.2d 634, 638 (11th Cir.1990) (publishing criticism of budget proposal); *see also Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir.1988) (giving television interview about experiencing racial discrimination on the State Police Force).

[7] Our statement in *Deremo* is not to the contrary. There we stated in dicta that "[w]e assume that an employee's complaint to a superior reporting the wrongful conduct of a public official, including sexual harassment, would ordinarily be a matter of public concern." *Deremo*, 939 F.2d at 912. While we agree that the general subject of sexual harassment in the workplace is a matter of public concern, each complaint must be assessed on a case-by-case basis. We will not permit an employee to manufacture First Amendment protection (thereby job security) by complaining on a matter related to a social concern.

outcome. An employee's speech will rarely be entirely private or entirely public. Rather than categorize each phrase the employee uttered, we "consider whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee." *Kurtz*, 855 F.2d at 727 (citing *Connick*, 461 U.S. at 147, 103 S.Ct. at 1690); *see Pearson*, 952 F.2d at 1278 ("Pearson's complaints primarily pertained to . . . [her employee grievance]. It was only incident to speaking on these concerns that [her] remarks touched on [what could be considered a public concern.]"). Considering the entire record, we conclude that Morgan primarily spoke as an employee in order to improve her work environment. While she did speak about her co-worker's plight, which contains a public concern aspect, *see Marshall*, 984 F.2d at 796, the main thrust of her speech took the form of a private employee grievance. Summary judgment on Morgan's section 1983 claim was therefore appropriate.

B.

Morgan claims that she was constructively discharged by the Department in violation of Title VII.[8] "[W]hen an employee involuntarily resigns in order to escape intolerable and illegal employment requirements to which he or she is subjected because of race, color,

---

[8] Title VII in pertinent part, makes it "an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . . " 42 U.S.C. § 2000e-2(a)(1).

religion, sex, or national origin, the employer has committed a constructive discharge in violation of Title VII." *Henson v. City of Dundee*, 682 F.2d 897, 907 (11th Cir.1982) (quoting *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir.1975) (internal quotation marks omitted)). Moreover, a plaintiff "must demonstrate that [her] working conditions were so intolerable that a reasonable person in [her] position would be compelled to resign." *Steel v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1317 (11th Cir.1989) (citations omitted); *see also Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir.1991); *Wardwell v. School Bd. of Palm Beach County*, 786 F.2d 1554, 1557 (11th Cir.1986).

As we have noted, Ford supervised Morgan on two separate occasions. During his first stint as supervisor, in 1984, Ford repeatedly, albeit indirectly, invited Morgan out. Moreover, Ford's inquiries continued even after Morgan had stated that she was not interested in forming a personal relationship with him. Once rebuffed, Ford proceeded to direct completely inappropriate and suggestive remarks at Morgan. In the guise of supervising her work, Ford hovered about her for hours at a time. In this way, he was able to subject Morgan to his unwanted personal attentions. In 1985, Ford rotated to another shift and was no longer Morgan's direct supervisor. Ford and Morgan had much less contact with each other, and most of Ford's inappropriate behavior stopped.

During the second period of supervision, Ford's undesired attentions and reports of masculine virility resumed. Ford's pervasive attention disturbed Morgan,

and she complained to Superintendent Burden. After concluding that her charges had not been substantiated, Burden warned Ford to be careful. Ford, having been reprimanded for misconduct before, apparently took the admonition to heart. Ford thus turned from lavishing unwelcome personal attention on Morgan to other methods of making her life miserable. When Ford's supervision of Morgan ceased again, in late 1987, the harassment did not stop. Ford had his co-workers send Morgan messages telling her to drop her charges because "no one would believe her." Additionally, Morgan faced the real possibility that at some point Ford would once again become her immediate supervisor. To preclude this from happening, Morgan resigned her position.

We conclude that a material question of fact remains as to whether Morgan's employment conditions were "intolerable." Accordingly, the district court erred in granting the Department's motions for summary judgment on Morgan's claims for reinstatement with back pay and fringe benefits.

III.

We affirm the district court's grant of summary judgment for Ford, Meadows and Burden. We vacate the grant of summary judgment for the Department, and remand the case for further proceedings not inconsistent herewith.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1722

In The

Supreme Court of the United States

October Term, 1993

JACQUELINE R. MORGAN,

Petitioner,

v.

JOHN S. FORD, et al.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

MICHAEL J. BOWERS
Attorney General of Georgia

JEFF L. MILSTEEN
Senior Assistant Attorney General of Georgia

GEORGE M. WEAVER
Special Assistant Attorney General of Georgia
Counsel of Record for Respondents
9040 Roswell Road
Suite 410, River Ridge
Atlanta, GA 30350
(404) 641-6010

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether private complaints by a public employee of alleged job discrimination against him or her that are made for the purpose of improving that employee's working conditions are on a matter of "public concern" to the community and thus protected by the First Amendment.

2. Whether, assuming *arguendo* that petitioner's First Amendment speech rights were violated, respondents are entitled to qualified immunity because reasonable prison officials in their positions could have believed in 1985-1988 that private complaints by a public employee of alleged job discrimination against him or her that were made for the purpose of improving that employee's working conditions were not on a matter of "public concern" to the community and thus not protected by the First Amendment.

LIST OF PARTIES

In addition to those listed by petitioner, the Georgia Department of Corrections was named as a party defendant.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 11

I. INTRODUCTION 11

II. THE ELEVENTH CIRCUIT CORRECTLY INTERPRETED AND APPLIED THE RELEVANT PRECEDENTS OF THIS COURT 13

III. THERE IS NO GENUINE CIRCUIT CONFLICT OVER THE ISSUES IN QUESTION 19

IV. RESPONDENTS ARE IN ANY EVENT ENTITLED TO QUALIFIED IMMUNITY AGAINST PETITIONER'S FIRST AMENDMENT CLAIM 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 28

Ayoub v. Texas A&M University, 927 F.2d 834 (5th Cir.), *cert. denied*, 112 S.Ct. 72 (1991) 22

Bausworth v. Hazelwood School District, 986 F.2d 1197 (8th Cir. 1993) 27

Brasslet v. Cota, 761 F.2d 827 (1st Cir. 1985) 26

Brawner v. City of Richardson, Texas, 855 F.2d 187 (5th Cir. 1988) 23

Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992) 27

Conaway v. Smith, 853 F.2d 789 (10th Cir. 1988) 25

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986) 27

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 14, 15

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) 27

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 28

Huang v. Bd. of Governors, 902 F.2d 1134 (4th Cir. 1990) 27

Knowlton v. Greenwood Independent School District, 957 F.2d 1172 (5th Cir. 1992) 23

Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir.) (*en banc*), *cert. denied*, 488 U.S. 909 (1988) 24, 25

Kurtz v. Vickery, 855 F.2d 723 (11th Cir. 1988) 18

Landgraf v. USI Film Products, ___ U.S. ___, No. 92-757 (April 26, 1994) 12

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) 27

TABLE OF AUTHORITIES – Continued

Page

O'Connor v. Steeves, 994 F.2d 905 (1st Cir.), *cert. denied, sub nom Town of Nehunt, Mass. v. O'Connor*, 114 S.Ct. 684 (1993) 25

Pickering v. Board of Education, 391 U.S. 563 (1968) 13, 14, 15, 16, 17, 18

Rankin v. McPherson, 483 U.S. 378 (1987) 17

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) 26

Saulpaugh v. Monroe Community Hospital, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994) 26

Siegert v. Gilley, 111 S.Ct. 1789 (1991) 28

Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) 20, 22

Thomson v. Scheid, 977 F.2d 1017 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2341 (1993)..... 27

Town of Nehunt, Mass. v. O'Connor, 114 S. Ct. 684 (1993) 25

Versarge v. Township of Clinton New Jersey, 984 F.2d 1359 (3d Cir. 1993) 26

Wilson v. UT Health Center, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1644 (1993) 20, 21

Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) 23, 24

Yatvin v. Madison Metropolitan School District, 840 F.2d 412 (7th Cir. 1988)..... 27

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1981a 12

42 U.S.C. § 1983 ..... 12, 15

42 U.S.C. § 2000e-2(a)(1) 12

42 U.S.C. § 2000e-3(a) 11, 12

42 U.S.C. § 2000e-5 12

RULES

Fed. R. Civ. P. 56(e) 9

Fed. R. Evid. 602 9

S. Ct. R. 10.1(a) 11

STATEMENT OF THE CASE

A full statement of facts is necessary because petitioner Morgan repeatedly misstates the record and relies on inadmissible hearsay. She was employed as a correctional officer at Augusta Correctional and Medical Institution ("ACMI") from September 1984 until April 1988. She was hired at the rank of Correctional Officer 1 and resigned as a Correctional Officer 2. (R1-Morgan Dep.-5, 13-15). ACMI is operated by defendant Georgia Department of Corrections ("DOC").

At the time of the events in question, Ford was a Lieutenant at ACMI. (R2-Ford Dep.-7). Burden was Superintendent of ACMI (R1-48-Exhibit A (Burden Declaration) at ¶2) and Meadows was Deputy Superintendent. (R1-48-Exhibit B (Meadows Declaration) at ¶2; R3-66).

Ford supervised petitioner during a portion of her employment at ACMI. Ford first supervised her for 6 months in 1985. (R1-Morgan Dep.-13-14; R1-48-Exhibit C (Ford Declaration) at ¶4). According to Morgan, Ford next supervised her in 1987. (R1-Morgan Dep.-105-107). This second period of supervision was not for a full 6 months. Ford says that he supervised her from September 9, 1987 through November 3, 1987. (R1-48-Exhibit C at ¶4). This evidence is unrebutted.

Morgan's social and marital status is pertinent. While employed at ACMI, Morgan was single and without children. (R1-Morgan Dep.-19). She actively dated (R1-Morgan Dep.-19-20). Moreover, as Correctional Officer Kenneth Carswell stated: "She's an attractive lady." (R2-Carswell Dep.-13). Ford was also single. (R1-48-Exhibit C at ¶16).

Although petitioner alleges that Ford sexually harassed her, she candidly admits that usual forms of such harassment were not used. She admits that Ford

never asked her for a date in the sense of accompanying him on a social occasion, physically touched her, exposed himself to her, or requested sexual favors. According to Morgan, he never used the word "date" or "sex" in speaking to her. (R1-Morgan Dep.-25-27, 52, 164).

Instead, Morgan complains that the following actions by Ford constitute sexual harassment. She states that the first series of actions all occurred during the six months of her supervision by Ford in 1985. (R1-Morgan Dep.-97-98). According to her, Officer Kenneth Carswell told her that Ford "wanted to go out on a date" with her. (R1-Morgan Dep.-18). Carswell testified on deposition that he, in response to a request by Ford, asked Morgan, "[D]o you want to go out with him?" (R2-Carswell Dep.-8). According to Carswell, Morgan profanely rejected the idea. (R2-Carswell Dep.-8, 48). This is the only request for a date shown by the record.

Petitioner also complains that on one occasion Ford told her "that Mr. Burden told him that he could not get his check and his pussy in the same place, 'But what he does not know will not hurt him.' " According to Morgan, this statement occurred during the first 6 months of her supervision by Ford. (R1-Morgan Dep.-47). Petitioner admits that she was certainly not offended by the idea that an employee should not date or have sexual relations with other employees, but that she considered the use of the word "pussy" to be offensive. (R1-Morgan Dep.-50-51). Morgan also interpreted Ford's statement to mean that he was going to try to do it anyway, despite Burden's directions. (R1-Morgan Dep.-51-52). But she admits that Ford never asked her for a date or sexual favors. (R1-Morgan Dep.-52).

Petitioner also complains that during the first 6 months of supervision Ford spent excessive amounts of time on her unit. (R1-Morgan Dep.-97-98). She testified

that on one occasion he stayed 4 to 5 hours in the AIDS Unit, 4-A. (R1-Morgan Dep.-55-56). But, according to petitioner, "nothing" happened when Ford stayed what she considered excessive amounts of time on her unit. (R1-Morgan Dep.-57-58). Yet she complains that during the 4 to 5 hour visit, Ford engaged in "constant checking" of her work. (R1-Morgan Dep.-64). She recalls the following conversation with Ford:

> Q. During the four to five hours, did he say anything at that time.
>
> A. That was when he was telling me about someone broke into – someone threw a brick through his bedroom window, and he asked me was it me. And I asked him did it hit him. And he said no, so I said it wasn't me.

(R1-Morgan Dep.-59). According to Morgan, Ford also said on this occasion: " 'You haven't had a real man until you've had me.' " (R1-Morgan Dep.-101). She says that during Ford's supervision of her he stayed on her unit longer than "normal" approximately once during each 4 or 5 day period. (R1-Morgan Dep.-67). Morgan also testified that Ford remained "about an hour or an hour and a half" on another occasion when "he stayed in the hallway when I was working with the AIDS patients during visitation." (R1-Morgan Dep.-68). On this occasion, Ford was approximately 8 feet away from her. (R1-Morgan Dep.-68-69). In her deposition, petitioner testified that on this occasion, Ford told her "that nobody was going to believe me with the sexual harassment thing and I just needed to stop it and I needed to stop it right then." (R1-Morgan Dep.-69-70).

Petitioner also complains of an incident that occurred at or near the ACMI gymnasium during the first 6 months of supervision by Ford. (R1-Morgan Dep.-97-98). After gym activities were concluded one night, Ford

apparently attempted to make an unannounced visit to Unit 12-A. Morgan called and warned the guard in Unit 12-A that Ford was coming. The next day, Morgan was reassigned. (R1-Morgan Dep.-81-83). At her deposition, she agreed that this incident was not sexual harassment. Nevertheless, she terms it general harassment. (R1-Morgan Dep.-83-85).

Morgan also complains that during the first 6 months of Ford's supervision and while working Unit 13-A, she engaged in a radio conversation with an Officer Chapman or Walker in another unit. (R1-Morgan Dep.-97-98). In this conversation, petitioner says that she told her fellow officer she was going to quit because of Ford's harassment. Although Morgan states that Ford never said anything to her about this conversation, the next day she was transferred to P-1 and her fellow officer was transferred to P-2. (R1-Morgan Dep.-86-91). Morgan also testified that at briefing the next day, Ford said:

> "There have been some rumors going around that I had been monitoring people's conversations. I have not been monitoring people's conversations. I have just been listening in to see how people talk to the inmates."

(R1-Morgan Dep.-88).

Petitioner also complains that once while she was off-duty Ford made a comment about her appearance. This also occurred during the first 6 months of her supervision by Ford. (R1-Morgan Dep.-93, 97-98). Morgan testified that she and her ex-boyfriend's sister came by ACMI on the way to a party. According to Morgan, "Lieutenant Ford made the comment to me that he didn't know that I can look that well in a dress, and that he's envisioned me without the dress on." (R1-Morgan Dep.-92-93).

All of the complaints mentioned so far allegedly occurred in 1985 in the first 6 months of Ford's supervision of Morgan. (R1-Morgan Dep.-97-98). During the next

6 months of her employment at ACMI, petitioner was not supervised by Ford, who transferred to a different shift. (R1-Morgan Dep.-98-100). During this period, she had "a lot less contact with Lieutenant Ford." (R1-Morgan Dep.-100). However, she complains that during this period at least once he again commented to her: " 'You haven't had a real man until you've had me.' " (R1-Morgan Dep.-100-104).

According to petitioner, Ford next supervised her in 1987. (R1-Morgan Dep.-105-106). This supervision began during Morgan's military leave which lasted from April 1987 through September 1987. (R1-Morgan Dep.-106). Ford says that he supervised Morgan from September 9, 1987 through November 3, 1987. (R1-48-Exhibit C at ¶4). Thus, from at least December 31, 1985 until September 1987, Ford did not supervise Morgan.

During the some 20 months when Ford was not supervising petitioner, they had little contact. She testified:

> He didn't make too many comments to me during that time, like I said earlier, because I had very little contact with him when he did not supervise me.

(R1-Morgan Dep.-104; *id.* at 172).

After her return from military leave in September 1987, Morgan for the first time complained to Superintendent Burden about her problems in 1985 with Ford. (R1-Morgan Dep.-108). She aired her complaints with Burden when she was called as a witness for Sheila Parrish. (R2-Burden Dep.-39). Petitioner testified in her deposition that she informed Burden of her complaints from 1985 against Ford which have been mentioned so far in this brief. (R1-Morgan Dep.-112-114). Morgan says that while on military leave she decided to pursue her complaints against Ford. (R1-Morgan Dep.-114-116).

Based on Burden's suggestion, petitioner repeated her complaints to the Internal Affairs Division of DOC. (R1-Morgan Dep.-119). The Internal Affairs Division found nothing to "substantiate the claims of sexual harassment against Lieutenant Ford." (R2-Burden Dep.-44). On October 9, 1987, Burden wrote letters to Morgan and Ford. In his letter to Morgan, Burden said:

> Recently you came to my office for the purpose of providing supporting testimony to Officer Sheila Parrish's claim of sexual harassment by Lt. John Ford.
>
> During the interview with me (Superintendent Burden) and with Internal Affairs Investigator Horne you failed to establish any incident which would be considered sexual harassment either directed at you or Officer Parrish.
>
> This letter to you is a warning. You have made a serious charge against your supervisor but were unable to substantiate those charges. Your having done so is unprofessional, unethical, and deemed harassing in itself.
>
> While I will not tolerate sexual harassment in the workplace. I am equally protective of those wrongfully accused. You are hereby warned against such future misconduct. Should misconduct of this nature reoccur disciplinary measures will be taken.

In his letter to Ford, Burden said:

> As a result of investigations by Superintendent Burden and by Jim Horne of GDC Internal Affairs you are cleared of the charges of sexual harassment filed against you by Officers Sheila Parrish and Jacqueline Morgan.
>
> It was noted in the investigation that your admitted personal conversation and remarks made during these personal conversations were

> used against you as sexual harassment. It was also noted that at no time did you ask for or demand sexual favors from either officer, by their own admission.
>
> You are admonished, however, for placing yourself in a position which could be construed as personal during the course of your tour of duty but are exonerated from sexual harassment charges.

(R1-48-Exhibit A at ¶¶4-5; Attachments 1 and 2 to Exhibit A).

According to petitioner, "some sexual harassment" continued but her primary problem became general harassment or retaliation. (R1-Morgan Dep.-124-125). After receiving Burden's letter, Morgan told Ford, "I was not going to fuck him and he was not going to fuck me for not doing so." (R1-Morgan Dep.-126). At one point in her deposition, Morgan stated that she made this remark to Ford because of the Burden letter. (R1-Morgan Dep.-127). Petitioner testified, "Lieutenant Ford didn't say nothing. He didn't write me up. He didn't do nothing." (R1-Morgan Dep.-126).

Morgan also complains that Ford on several occasions, both during and after the first six months of supervision, made statements regarding love and hate. Morgan describes Ford's statements as follows:

> "There is a thin line between love and hate, Morgan." That's all he would say, "There's a thin line between love and hate," and one day I was going to realize that I love him. And that, "You ain't got to love me. My mamma loves me," and stuff like that. He constantly made that statement of there's a thin line between love and hate. I failed to mention that the first six months, too.

(R1-Morgan Dep.-127-128). Although Morgan cannot remember the exact number of times Ford made this

statement, she says that it was made more than 3 times. (R1-Morgan Dep.-128).

Petitioner next complains that she was admonished or received a "counseling statement" for failing to respond to an "officer needs assistance" call in Dorm 11-A. (R1-Morgan Dep.-131). Morgan admits that she did not receive a written charge or disciplinary statement for this incident. (R1-Morgan Dep.-131). Apparently, Correctional Officer John Diggins reported her for failing to respond to an "officer needs assistance" call. (R1-Morgan Dep.-132-136, 180). According to petitioner, Ford stated regarding her conduct:

> He said that it would not be tolerated and that he was warning me. It was a counseling statement and he was warning me.

(R1-Morgan Dep.-136). Morgan agreed that this counseling statement "had no effect on [her] salary or [her] rank or the conditions of [her] employment." (R1-Morgan Dep.-137).

Petitioner next complains that she was admonished or counseled for being rude to a visitor. She received this counseling statement from defendant Meadows. According to Morgan,

> [Meadows] said that Lieutenant Moore noticed me when I came into work when we walked through the sally port to get back into the briefing room. He said that Lieutenant Moore said that I had been rude to a visitor. And Lieutenant Moore talked to Lieutenant Ford about it, and Lieutenant Ford suggested I be counseled on it, so I got called up about a week or so later by Mr. Meadows, and I was counseled on being rude to a visitor.

(R1-Morgan Dep.-138-39). Petitioner says that this incident occurred in October or November of 1987. (R1-Morgan Dep.-139). Although Morgan claims that this

counseling statement affected her emotionally, she admits that it did not affect the conditions of her employment. (R1-Morgan Dep.-140-141). According to Morgan, Meadows was retaliating because by this time she had filed a complaint with the Georgia Office of Fair Employment Practices (OFEP). (R1-Morgan Dep.-141-142). The only reason she has for believing Meadows was retaliating for her complaint is "[h]e's Lieutenant Ford's supervisor." (R1-Morgan Dep.-142).

Morgan complains that, on November 3, 1987, she was given an interim report of performance with a 2.6 rating. (R1-Morgan Dep.-138, 142, 147; Appellant's Eleventh Cir. Brief at 6; R1-48-Exhibit C at ¶8; Attachment 1 to Exhibit C). According to petitioner, Ford presented her with this rating and stated that she "had a negative attitude toward [her] supervisor and that [she] talked on the phone too much." (R1-Morgan Dep.-142-43). Morgan states that in July 1987, while on military leave, she had received a 3.4 rating.

Petitioner also objects to various assignments at ACMI after her complaints of sexual harassment. She states that she was the first female ever to work the tower. Although she would have considered assignment to that position by another supervisor as a recognition of her ability, because it came from Ford she considered it "another form of harassment." (R1-Morgan Dep.-148). Morgan states that she had no problems on the tower. According to her, "I was good." (R1-Morgan Dep.-149). Petitioner is, however, mistaken in her statement that she was the first female to work the tower. Her statement may not be considered because she does not purport to speak on personal knowledge. Fed. R. Evid. 602; Fed. R. Civ. P. 56(e). The contrasting declaration of Ford, made on personal knowledge, establishes that other females had been assigned before Morgan to the tower and other

locations (Units 11-A, 12-A, and 122-B) about which Morgan now complains. (R1-48-Exhibit C at ¶7).

She also complains of assignments to Units 11-A, 12-A, and 12-B. (R1-Morgan Dep.-149-152). As with respect to the tower assignment, petitioner did not consider the positions themselves to be harassing but interprets her assignment by Ford to those positions as harassing. (R1-Morgan Dep.-151-153).

Morgan applies a strict definition of "sexual harassment." According to her, two other fellow staff members at ACMI, Lieutenant Moore and Sergeant James Smith also asked her for dates. Morgan testified on deposition that she also considered these requests to be sexual harassment. (R1-Morgan Dep.-164-165).

According to petitioner, the only act of strict sexual harassment by Ford after she filed her OFEP charge in November 1987 was the comment about a "thin line between love and hate." (R1-Morgan Dep.-171-172).

As previously stated, Morgan resigned from ACMI in April 1988. (R1-48-Exhibit C at ¶10; Attachment 3 to Exhibit C). In this suit, Morgan contends that she was constructively discharged although at the time she resigned she was no longer supervised by Ford. (R1-Morgan Dep.-153; Exhibit 3 at ¶4). And petitioner admits that during the some 5½ months before her resignation when she was not supervised by Ford she had little contact with him: "And I told you several times that I very seldom saw him after he did not supervise me." (R1-Morgan Dep.-172).

Restating these facts with all inferences in her favor, the Eleventh Circuit held that there were genuine issues of material fact under Title VII as to whether petitioner had been constructively discharged as a result of sexual harassment. 6 F.3d at 755-56. The court affirmed summary judgment against her First Amendment speech claim and

rejected without separate discussion her Title VII retaliation claim under 42 U.S.C. § 2000e-3(a). The lower court rejected her First Amendment claim on the ground that her private complaint of alleged sexual harassment against her was not of public concern.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION

This case does not warrant Supreme Court intervention. Unlike petitioner's representations, the Eleventh Circuit decision does not conflict with precedents of this Court, there is no genuine conflict in the circuits on issues presented, and there are no other "special and important reasons" calling for exercise of the Court's power of supervision. S. Ct. R. 10.1(a).

Petitioner seeks the extraordinary status of First Amendment protection against her employer, which is not available to private sector employees, for private complaints she made of alleged job discrimination against her. As Morgan admits in her deposition, in the speech for which she seeks protection, "[s]he [was] complaining about the effect that [the alleged sexual harassment] had on [her] ability to do [her] job." (R1-Morgan Dep.-174). And in her complaint, she alleges that her speech for which she now seeks protection concerns Ford's "sexual comments *to her* in the past." (R1-2-¶¶16, 31, 32) (emphasis added). Moreover, in her complaint to OFEP, Morgan complains only of sexual harassment against herself. (R1-48-Exhibit C at ¶9, Attachment 1 to Exhibit C). Although Morgan also spoke about a "co-worker's plight," 6 F.3d at 755, Morgan has not sought First Amendment protection for any speech she made concerning alleged sexual harassment against that

employee or any other employees of DOC, ACMI, or women in general.

Oddly, Morgan does not pursue her Title VII claim for retaliation. Under 42 U.S.C. § 2000e-3(a), it is "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Although Morgan pled a claim under this section in her complaint (R1-16-¶34), the Eleventh Circuit without discussion affirmed summary judgment against it, leaving for trial only the issue of whether Morgan suffered constructive discharge as a result of sexual harassment in violation of 42 U.S.C. § 2000e-2(a)(1).

It is apparent that Morgan has chosen to abandon her Title VII retaliation claim and pursue only her First Amendment speech claim in this Court because she seeks to expand legal protection for speech regarding job discrimination, particularly sexual harassment. Inasmuch as plaintiff's Title VII claim arose prior to the effective date of the Civil Rights of 1991, Morgan has no right to jury trial and her remedies are limited to "reinstatement with back pay and fringe benefits." 6 F.3d at 756. *See Landgraf v. USI Film Products*, ___ U.S. ___, No. 92-757 (April 26, 1994).[1]

Moreover, acceptance of Morgan's arguments would transform almost every Title VII claim by a public employee into a First Amendment claim, thus bypassing

---

[1] Of course, even under the Civil Rights Act of 1991, the remedies for a Title VII plaintiff are inferior to the unlimited remedies available under Morgan's preferred vehicle, 42 U.S.C. § 1983. *See* 42 U.S.C. §§ 2000e-5, 1981a.

the Congressionally-limited remedies for retaliation against Title VII related speech. Respondent's admire the audacity of petitioner's effort but not its logic. Every public employee's job problems can easily be cast as retaliation for speech. Every governmental clerk can claim that the real reason she was disciplined or not promoted is something she said several weeks earlier about her unfair treatment. Petitioner's proposed expansion of public employee speech protection would paralyze discipline and productivity in public employment.

II. THE ELEVENTH CIRCUIT CORRECTLY INTERPRETED AND APPLIED THE RELEVANT PRECEDENTS OF THIS COURT.

The Eleventh Circuit's decision is fully consistent with this Court's public employee speech cases. Unlike petitioner's arguments, the Eleventh Circuit did not place "exaggerated – and extraordinarily unfair – emphasis on petitioner's failure to 'go public' with her sexual harassment charges." (Petition at 8). Moreover, the lower court did not, as petitioner argues, improperly consider petitioner's motive in deciding whether her speech was protected by the First Amendment.

In several important decisions, this Court has prescribed the parameters of a public employee's First Amendment right of free speech. The seminal case is *Pickering v. Board of Education*, 391 U.S. 563 (1968). A public high school teacher, Marvin Pickering, was fired for sending a letter to a local newspaper criticizing local education officials, under whom he worked, for practices in the use of school funds and the raising of such funds. The teacher thus "sp[oke] out publicly." *Id.* at 568. And he " 'sign[ed his] letter as a citizen, taxpayer and voter, not as a teacher.' " *Id.* at 578. The Court held:

> However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.
>
> [A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

391 U.S. at 574. In what has been called "the *Pickering* balance," the Court described various factors that should be considered or balanced in deciding whether a public employee's speech may furnish grounds for dismissal. The interests of the government "in promoting the efficiency of the public services" must be balanced against the employee's interest "as a citizen, in commenting upon matters of public concern." *Id.* at 568.

In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Court held that speech regarding racism, which was expressed privately by school teacher Bessie Givhan in encounters with her principal, was not without constitutional protection.

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.

Id. at 415. Givhan's school district was under a desegregation order and her speech at issue was "the School District's allegedly racially discriminatory policies." *Connick v. Myers*, 461 U.S. 138, 146 (1983) (citing *Givhan*, 439 U.S.

410). Moreover, she "sp[oke] as a citizen on a *matter of general concern, not tied to a personal employment dispute.*" *Connick*, 461 U.S. at 148 n.8 (emphasis added) (citing *Givhan*, 439 U.S. at 415-16).

Another important case on this subject is *Connick v. Myers*, 461 U.S. 138 (1983). As assistant district attorney in New Orleans, Sheila Myers, who was unhappy with her job assignment, was fired for circulating a questionnaire which her employer considered insubordinate. Affirming the right established in *Pickering* of a public employee "to comment on matters of public interest," *id.* at 140, the Court held that the questionnaire was "most accurately characterized as an employee grievance concerning internal office policy," and the First Amendment claim under 42 U.S.C. § 1983 an "attempt to constitutionalize the employee grievance." *Id.* at 154. The Court pointed out that Myers "*did not seek to inform the public* that the District Attorney's Office was not discharging its governmental responsibilities. . . . *[n]or seek to bring to light* actual or potential wrongdoing or breach of public trust. . . . " *Id.* at 148 (emphasis added). The Court held that whether a public employee has spoken on a matter of public concern is determined by whether her "expression can[] be fairly considered as relating to any matter of political, social, or other concern to the community" and that this determination is made from "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 146-48. And, held the Court, "The inquiry into the protect status of speech is one of law, not fact." *Id.* at 148 n.7.

One of the questions, however, on the questionnaire in *Connick* inquired whether the other assistant district attorneys " 'ever feel pressured to work in political campaigns on behalf of office supported candidates.' " *Id.* at

149, 154-55. The Court found that this one question (out of a total of 14) "touched upon matters of public concern in only a most limited sense." 461 U.S. at 154. The Court thus applied the *Pickering* balance in order to determine whether Myers' discharge was constitutional in view of this question. While "caution[ing] that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern," *id.* at 152, the Court held that Connick was justified in regarding the questionnaire as a threat to his authority. *Id.* at 152-53.

The Court emphasized in *Connick* that constitutional speech protection is not available to private employees, *id.* at 147 (protection of public employee speech "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State"), and that abuse of such protection could severely hamper efficiency in public agencies:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that *government offices could not function if every employment decision became a constitutional matter.*
>
> * * *
>
> *To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case.* While as a matter of good judgment, public officials

> should be receptive to constructive criticism offered by their employees, *the First Amendment does not require a public office to be run as a round-table for employee complaints over internal office affairs.*

Id. at 143, 149 (emphasis added).

Four years later, the Court again grappled with the speech rights of public employees. In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court held that the First Amendment speech rights of a clerical employee, Ardith McPherson, in a Texas constable's office were violated when she was discharged for expressing support for the assassination of President Reagan. The Court first concluded that the statement "plainly dealt with a matter of public concern" because it was "made in the course of a conversation addressing the policies of the President's administration" and "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President." *Id.* at 386-87. Having found that the statement addressed a matter of public concern, the Court then placed it in the *Pickering* balance. *Id.* at 388-89.

Despite petitioner's urging that the public concern test for public employee speech be collapsed into an "objective" content-only standard (Petition at 16), this Court has held not only that the "content, form, and context . . . as revealed by the whole record" must be considered, *Connick*, 461 U.S. at 147-48, but also repeatedly affirmed that it is not "appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." Rather, the Court has prescribed only "general lines along which an analysis of the controlling interests should run." *Pickering*, 391 U.S. at 569. *See also Connick*, 461 U.S. at 154. This framework

obviously requires the "case-by-case" assessment employed by the Eleventh Circuit. 6 F.3d at 755 n.7.

The Eleventh Circuit correctly interpreted and applied these and other relevant Supreme Court precedents. As part of the " 'content, form and context . . . as revealed by the whole record,' " *Connick*, 461 U.S. at 147, the lower court considered in its public concern analysis petitioner's motivation or intent in complaining of alleged sexual harassment and whether she attempted to communicate her concerns to the public. However, the lower court did not give controlling weight to either aspect. 6 F.3d at 754-55. *See also Kurtz v. Vickery*, 855 F.2d 723, 727 (11th Cir. 1988) ("Although an employee's efforts to communicate his or her concerns to the public are relevant to a determination of whether or not the employee's speech relates to a matter of public concern, focusing solely on such behavior, or on the employee's motivation, does not fully reflect the Supreme Court's directive that the content, form, and context must all be considered.")

The Eleventh Circuit did not depart from this Court's prescribed analysis by considering petitioner's "attempts to make [her] concerns public." 6 F.3d at 754. In *Pickering*, the letter to a newspaper was obviously a communication to the public. 391 U.S. at 565-66. In *Connick*, the Court considered Myers's failure to "seek to inform the public. . . . [or] to bring to light" any abdication of responsibilities or wrongdoing by her public employer. *Id.* at 148. The Court considered this in deciding that "with but one exception, the questions posed by Myers to her coworkers do not fall under the rubric of matters of 'public concern.' " *Id.*

The Eleventh Circuit also properly considered in its public concern analysis petitioner's motivation or intent in speaking. 6 F.3d at 754-55. In *Pickering*, the Court

considered that Pickering intended to speak "as a member of the general public" or "citizen." 391 U.S. at 568, 574. In *Connick*, as discussed above, this Court repeatedly refers to Myers' motivation in deciding whether her speech was on a matter of public concern. Indeed, the observation that Myers did not "seek" to make her concerns public is an evaluation of her intent. Moreover, the observation that her "focus . . . [was] not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors" is an assessment of her intent. 461 U.S. at 148. As the Court found, "These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbres." *Id.* And the Court's characterization of Myers' questionnaire as "an employee grievance concerning internal office policy" is also an assessment of her motivation. *Id.* at 154.

III. THERE IS NO GENUINE CIRCUIT CONFLICT OVER THE ISSUES IN QUESTION.

Petitioner argues that the "circuit courts are now in fundamental conflict on *Connick* and the probability of a shift toward greater doctrinal uniformity is remote." She elaborates that the "courts have reached conflicting decisions on whether speech is constitutionally protected based upon the weight given to the plaintiff's 'motive' in speaking." (Petition at 19). She argues that the Eleventh Circuit's holding concerning " 'motive' in speaking is at odds with the analytical approach generally taken by the Courts of Appeals for the First, Third, Fifth, Ninth, Tenth, and District of Columbia Circuits." She states, "The Fifth and Tenth Circuits provide perhaps the leading examples." (Petition at 20 n.12; 20).

Petitioner offers as her best example of a circuit conflict *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1644 (1993). Plaintiff Marilyn Wilson contended that her demotion and discharge from the position of sergeant on the University of Texas Health Center ("UTHC") police force was in "retaliation for her reports of sexual harassment within the UTHC police force." *Id.* at 1265. She presented a number of claims including violation of her First Amendment speech rights. *Id.* Wilson made written reports of an incident of alleged sexual harassment directed against her and of alleged sexual harassment directed against several other UTHC employees. She was later reprimanded, suspended, demoted, and eventually terminated purportedly for several problems including alleged misrepresentations in her reports of sexual harassment. *Id.* at 1266-67. The Fifth Circuit concluded that the district court erred in determining that Wilson's speech was not of public concern. The court noted, in language similar to the Eleventh Circuit's in the instant case: "The content of Wilson's speech – reports of sexual harassment perpetrated on her and other women at UTHC – is of great public concern." *Id.* at 1268. *Cf. Morgan*, 6 F.3d at 754, 755 n.7. The court distinguished its earlier decision in *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987), on the ground that the speech held not of public concern in *Terrell* "was not of public concern in part because the speech consisted exclusively of criticisms of the competence of the speaker's supervisor." *Wilson*, 974 F.2d at 1269.[2]

---

[2] In *Wilson*, the Fifth Circuit also distinguished *Connick* on the ground that the speech held not to be of public concern in *Connick* merely involved a public workplace and did not

The present case differs from *Wilson* in that, as discussed previously, instant petitioner's reports of alleged sexual harassment for which she contends she suffered retaliation concerned only sexual harassment against herself and not any other ACMI or DOC employees. In her complaint, Morgan alleges that while being interviewed regarding alleged sexual harassment against another ACMI employee, "plaintiff indicated that defendant Ford had made sexual comments to her in the past." (R1-2-¶ 16). She alleges that due to his comments she "contact[ed] Internal Affairs [of DOC] in order to file a formal complaint against defendant Ford." (*Id.*) Petitioner alleges that she later filed a charge with OFEP "alleging that she had been discriminated against because of her sex, and retaliated against for having filed sexual harassment charges against defendant Ford." (*Id.* at ¶ 24). In this charge with OFEP, Morgan complains only of sexual harassment against herself and that she was "retaliated against for having filed sexual harassment charges against [her] supervisor." (R1-48-Exhibit C at ¶ 9, Attachment 1 to Exhibit C). In her complaint in the district court, petitioner alleged that her complaints of sexual harassment directed against her, including the filing of

---

concern " 'public official misconduct.' " 973 F.2d at 1269 (cit. omitted). This is frankly mistaken because one of the questions held not of public concern in *Connick* asked whether members of the District Attorney's office had "confidence in and would . . . rely on the word of" certain named supervisors. *Connick*, 461 U.S. at 148, 155. Obviously, this question does relate to official misconduct. But it was held by this Court not to be of public concern because in view of its "content, form, and context" it was a "mere extension[] of Myers' dispute over her transfer." *Id.* at 148.

charges of discrimination, "were [First Amendment] protected activities addressing matters of public concern" and as a result of this speech she suffered various forms of retaliation. (R1-2-¶¶ 21, 24, 25, 31, 32). In fact, Morgan does not even allege with her complaint that she made any statements regarding sexual harassment directed against other ACMI or DOC employees. She merely alleges that in the context of an interview concerning a "co-worker's sexual harassment complaint against defendant Ford" she stated "that defendant Ford had made sexual comments to her [petitioner] in the past." (R1-2-¶¶ 14-16). Further, petitioner admits in her deposition that "she [was] complaining about the effect that [the alleged sexual harassment] had on [her] ability to do [her] job." (R1-Morgan Dep.-174).

Thus, the Eleventh Circuit's conclusion is eminently correct that "the main thrust of her speech took the form of a private employee grievance." 6 F.3d at 755. Indeed, the only speech for which Morgan asserts First Amendment protection in her complaint is her private grievance that allegedly interfered with her "ability to do [her] job." (R1-Morgan Dep.-174). *Wilson* is, therefore, a quite different case in that Wilson claimed First Amendment protection for speech concerning widespread sexual harassment and there was no evidence that her only purpose was improvement of her own job conditions.

Petitioner is mistaken in thinking the Fifth Circuit does not consider efforts to communicate with the public and motivation or intent in deciding the public concern issue. In *Terrell* the Fifth Circuit held that the contents of a notebook were not protected speech because in part appellant "made no effort to communicate the contents of the notebook to the public." 792 F.2d at 1362-63. Also in *Ayoub v. Texas A&M University*, 927 F.2d 834 (5th Cir.),

cert. denied, 112 S.Ct. 72 (1991), the Fifth Circuit affirmed a judgment notwithstanding the verdict to the effect that appellant's speech regarding pay disparity directed against foreign-born professors was not protected by the First Amendment because it did not involve a matter of public concern. In support of this holding, the court found that appellant complained only about his own salary and that he "never attempted to air his complaints in a manner that would call the public's attention to the alleged wrong." *Id.* at 837. Further, in *Knowlton v. Greenwood Independent School District*, 957 F.2d 1172 (5th Cir. 1992), the Fifth Circuit held that cafeteria workers' complaints about being required to serve meals after hours and without pay were not protected by the First Amendment. *Id.* at 1178 ("The record reflects that the workers' concern was the effect of the meal program on their employment and personal lives, rather than the public interest in [Fair Labor Standards Act] violations."). *See also Brawner v. City of Richardson, Texas*, 855 F.2d 187 (5th Cir. 1988) (in holding that letter by police officer was on matter of public concern, court emphasized that: letter "contain[ed] serious allegations of possible police misconduct"; was sent "not simply as an employee, but as a citizen"; and was "sent not only to the police chief, but also to the mayor, city council members, and reporters at the local paper").

Petitioner also showcases *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), as in conflict with the Eleventh Circuit's decision here. The Tenth Circuit reviewed police officer Sheldon Wulf's letter to the Kansas Attorney General containing allegations of widespread misconduct by the chief of police of Wichita and " '[g]ross misconduct on the part of a staff member in the sexual harassment of a

subordinate employee.' " *Id.* at 850. Wulf was the president and a member of the executive board of the state Fraternal Order of Police ("FOP"). The main thrust of his letter was to expose the chief of police's widespread discrimination against the FOP and its members and to "request[] an investigation." *Id.* at 848-50. In addition to forwarding the letter to the attorney general, Wulf "showed an earlier draft of the letter to several officers who were active in the state FOP." *Id.* at 849. He also showed the letter to an assistant district attorney and its contents were disclosed to news reporters. *Id.* at 849-51. The court did not specifically decide whether the disputed incident of alleged sexual harassment was of public concern because the "remaining allegations" did involve such concern. *Id.* at 860. In finding the letter protected speech, the court emphasized that it was communicated outside the police department to the attorney general and that its intent was to "seek[ ] an investigation of alleged misconduct by a public official." *Id.* at 860.

It is thus apparent that the Eleventh Circuit's decision in *Morgan* is not in conflict with *Wulf*. In both cases, the respective courts considered in their public concern analyses efforts to communicate with the public and the employees' motivation in speaking.

And the Tenth Circuit frequently considers efforts to communicate with the public and motivation in deciding whether public employee speech is on a matter of public concern. In *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.) (*en banc*), *cert. denied*, 488 U.S. 909 (1988), the court held that a report by a city fire marshal "in which he stated his professional opinion as to the cause of a fire" did not address a matter of public concern for First Amendment purposes. *Id.* at 1437, 1447. The court held that his "report did not 'sufficiently inform the issue as to

be helpful to the public in evaluating the conduct of government.' " *Id.* at 1447 (cit. omitted). And the court found regarding motivation:

> But there is no evidence that Koch's fire investigation report and his conclusion as to the cause of the fire was in any way motivated or inspired by such alleged improprieties or by the desire to expose those improprieties.

Id. at 1448. *See also Conaway v. Smith*, 853 F.2d 789, 796-97 (10th Cir. 1988) (considering city employee's "motivat[ion]" and that he "sought 'to bring to light actual or potential wrongdoing or breach of public trust on the part of a public officer,' " in holding speech to be protected) (cit. omitted).

Petitioner is also mistaken in asserting that there is a conflict between the Eleventh Circuit's decision here and "the analytical approach generally taken" by other circuits in addition to the Fifth and Tenth, namely: the First, Third, Ninth, and District of Columbia Circuits. (Petition at 20 n.12).[3] Petitioner erroneously describes the views of these circuits, just as she does those of the Fifth and Tenth. In fact, all of the circuits – just as the Fifth, Tenth, and Eleventh – consider effort to communicate with the public and employee motivation or intent in deciding the public concern issue.[4]

---

[3] Petitioner concedes that decisions of the Second, Sixth, and Seventh Circuits are consistent with *Morgan*. (Petition at 23-26).

[4] *See* **First Circuit:** *O'Connor v. Steeves*, 994 F.2d 905, 913-14 (1st Cir.), *cert. denied, sub nom Town of Nehunt, Mass. v. O'Connor*, 114 S.Ct. 684 (1993) (where public employee speech is "on a topic which would not necessarily qualify, on the basis of content alone, as a matter of inherent public concern (e.g., *internal working conditions, affecting only the speaker and coworkers),*"

---

consideration may be given to "whether the 'form' of the employee's expression suggests a *subjective intent to contribute to any . . . public discourse*") (emphasis added); *Brasslet v. Cota*, 761 F.2d 827, 841-42 (1st Cir. 1985) (considering "question of *malice* . . . a *subjective inquiry into the speaker's actual state of mind*" in holding that fire chief's speech in a television interview concerning "available fire protection within the Town and the Town Council's actions in dealing with related problems is a prototypical matter of public interest") (emphasis added); **Second Circuit:** *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 142 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994) ("Here, however, there has been no violation of the First Amendment, because Saulpaugh's *complaints were 'personal in nature and generally related to her own situation.'* [cit. omitted]. In the instant case there is no indication that the plaintiff 'wanted to debate issues of sex discrimination,' that her suit sought 'relief against pervasive or systemic misconduct by a public agency or public officials,' or that her suit was 'part of an overall effort . . . to correct allegedly unlawful practices or bring them to public attention. [cit. omitted]. Although evidence was subsequently uncovered that Rosemond had also sexually harassed a prior employee, Saulpaugh's complaints, like those of the plaintiffs in *Ezekwo* and *Yatvin*, were *motivated by and dealt with her individual employment situation.*") (emphasis added); **Third Circuit:** *Versarge v. Township of Clinton New Jersey*, 984 F.2d 1359, 1364-65 (3d Cir. 1993) ("[T]he speaker's *motivation is relevant* to the extent that it indicates whether the speaker is speaking as 'a citizen upon matters of public concern' or . . . 'upon matters only of personal interest.'. . . . [T]he *content* of plaintiff's speech *is not determinative* of whether the speech involves public concern.") (emphasis added); *Rode v. Dellarciprete*, 845 F.2d 1195, 1200-02 (3d Cir. 1988) (*"[M]otivation [is] merely one factor* to be considered, but *not necessarily controlling*, in assessing the character of the employee's speech. . . . [W]e hold that when a public employee participates in an interview sought by a news reporter on a matter of public concern, the employee is engaged in the exercise of a first amendment right to freedom of speech, even

---

though the employee may have a personal stake in the substance of the interview.") (emphasis added); **Fourth Circuit:** *Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986) (considering a public school teacher's aide's "communicat[ion] to a public official" and whether her motive was to expose "wrongdoing or a breach of trust . . . [instead of expressing a] *personal grievance about working conditions,*" in holding speech not of public concern) (emphasis added); *Huang v. Bd. of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990) ("And it is settled that a public employee's expression of grievances concerning his own employment is not a matter of public concern."); **Sixth Circuit:** *Thomson v. Scheid*, 977 F.2d 1017, 1020-21 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2341 (1993) (considering county investigator's intent and fact that he spoke only in course of duties, in holding speech regarding fraud investigation not of public concern); **Seventh Circuit:** *Colburn v. Trustees of Indiana University*, 973 F.2d 581, 587-88 (7th Cir. 1992) (considering *"plaintiff's goal"* and *"choice of [non-public] forum"* in holding speech by former university faculty not of public concern) (emphasis added); *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 419 (7th Cir. 1988) (holding that sex discrimination complaint against a school district was not on a matter of public concern because the plaintiff "wanted to advance her career, not promote a cause"); **Eighth Circuit:** *Bausworth v. Hazelwood School District*, 986 F.2d 1197, 1198-99 (8th Cir. 1993) ("we consider *whether the employee attempted to communicate the speech to the public at large* and the employee's *motivation* in speaking") (emphasis added); **Ninth Circuit:** *McKinley v. City of Eloy*, 705 F.2d 1110, 1114-15 (9th Cir. 1983) (considering that police officer's "speech was specifically and *purposefully directed to the public* both through city council meetings and a television interview," in holding it to be of public concern); **District of Columbia Circuit:** *Hall v. Ford*, 856 F.2d 255, 259-60 (D.C. Cir. 1988) ("Speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental

IV. RESPONDENTS ARE IN ANY EVENT ENTITLED TO QUALIFIED IMMUNITY AGAINST PETITIONER'S FIRST AMENDMENT CLAIM.

Even if the individual respondents somehow violated petitioner's First Amendment rights, she cannot overcome their qualified immunity.[5]

Under the objective test of qualified immunity currently in effect, a public employee is protected unless his conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The defense is established if "a reasonable [public official] could have believed [his actions] to be lawful, in light of clearly established law and the information [he] possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The qualified immunity issue presented here, which was not reached by the Eleventh Circuit, may be stated as follows: whether at the time of respondents' actions reasonable prison officials in their positions could have believed that private complaints by a public employee of alleged job discrimination against him or her that were

---

agencies. On the other hand, speech that concerns 'issues about which information is needed or appropriate to enable members of society' to make informed decisions about the operation of their government merits the highest degree of first amendment protection.") (cit. omitted).

[5] This Court has held that, before reaching qualified immunity, the trial court should first "determin[e] . . . whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). However, instant respondents' near certain entitlement to qualified immunity would hardly make this case an appropriate vehicle for the massive doctrinal change petitioner seeks.

made for the purpose of improving that employee's working conditions were not on a matter of public concern to the community and thus not protected by the First Amendment. Without question, in light of previously-discussed Supreme Court precedents, Eleventh Circuit authority, and the unanimous view of the other circuits, reasonable prison officials could hardly have believed otherwise. Indeed, any expectation that a private complaint of alleged job discrimination made for the purpose of improving the complainant's working conditions would be considered on a matter of public concern and therefore eligible for First Amendment protection would have required the skill of a prophet. Much is expected of public employers, but prophecy has never been required.

CONCLUSION

The Court should therefore deny the petition. In considering Morgan's lack of effort to communicate with the public and intent or motivation in making a private complaint of alleged job discrimination, the Eleventh Circuit fully obeyed this Court's precedents and acted consistently with the decisions of the other circuits. And there are no other "special and important reasons" calling for review inasmuch as the wholesale revision of public employee speech protection sought by petitioner would have drastically detrimental effects on efficiency and discipline in public employment.

Petitioner is not left without a remedy. She has been remanded to the district court for trial of her Title VII sexual harassment claim. She could have pursued here, but chose not to, her Title VII speech retaliation claim. This gambit on her part in hopes of catalyzing massive doctrinal change should hardly be rewarded.

Moreover, her bizarre citation to Georgia criminal laws against violent conduct and her quotation of various non-record, irrelevant, and hearsay news articles regarding alleged sexual misconduct involving prison staff and inmates at other institutions in Georgia (Petition at 7-8, 29 n.18) hardly support her petition but rather show its poverty.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General of Georgia

JEFF L. MILSTEEN
Senior Assistant Attorney General
of Georgia

GEORGE M. WEAVER
Special Assistant Attorney General
of Georgia
Counsel of Record for Respondents

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JACQUELINE R. MORGAN

Petitioner,

v.

JOHN S. FORD, *ET AL.*

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

(Additional *Amici Curiae* listed on inside cover)

JUDITH L. LICHTMAN
DONNA R. LENHOFF
HELEN L. NORTON
WOMEN'S LEGAL DEFENSE FUND
1875 CONNECTICUT AVE., N.W.
SUITE 710
WASHINGTON, D.C. 20009
(202) 986-2600

JOHN VANDERSTAR*
SANDRA L. SPEAR
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Amici Curiae

*Counsel of Record

MAY 31, 1994

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO

THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO

THE CENTER FOR WOMEN POLICY STUDIES

THE COALITION OF LABOR UNION WOMEN

EQUAL RIGHTS ADVOCATES, INC.

MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION

THE NATIONAL COUNCIL OF JEWISH WOMEN

THE NATIONAL EDUCATION ASSOCIATION

THE NATIONAL ORGANIZATION FOR WOMEN

THE NATIONAL TREASURY EMPLOYEES UNION

NOW LEGAL DEFENSE AND EDUCATION FUND

THE NORTHWEST WOMEN'S LAW CENTER

WIDER OPPORTUNITIES FOR WOMEN

WOMEN EMPLOYED

THE WOMEN'S LAW PROJECT

THE WOMEN'S POLICY GROUP

WOMEN WORK!

QUESTION PRESENTED

Whether a public employee's speech that addresses a "matter inherently of public concern" and hence is entitled to First Amendment protection may lose that protection altogether because of the employee's personal stake in the subject of the speech.

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. *CONNICK* AND *RANKIN* ESTABLISH THAT SPEECH WHICH IS INHERENTLY OF PUBLIC CONCERN IS ENTITLED TO FIRST AMENDMENT PROTECTION. 4

II. THE CIRCUITS APPLY CONFLICTING INTERPRETATIONS OF *CONNICK* AND *RANKIN*. 5

A. Three Circuits Hold That Speech Which Is Inherently of Public Concern May Lose Its First Amendment Protection Because of Its Form or Context. 6

B. Other Circuits Hold That Speech Which Is Inherently of Public Concern Remains Protected No Matter What Its Form or Context. 10

III. THIS CASE PRESENTS AN IMPORTANT ISSUE OF BROAD PRACTICAL IMPORTANCE. 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **Page**

Auriemma v. *Rice*,
910 F.2d 1449 (7th Cir. 1990), (*en banc*), *cert. denied*,
501 U.S. 1204 (1991) 9, 14
Brawner v. *City of Richardson*,
855 F.2d 187 (5th Cir. 1988) 14
Breuer v. *Hart*,
909 F.2d 1035 (7th Cir. 1990) 14
Bryson v. *City of Waycross*,
888 F.2d 1562 (11th Cir. 1989) 14
Callaway v. *Hafeman*,
832 F.2d 414 (7th Cir. 1987) 7, 14
Connick v. *Myers*,
461 U.S. 138 (1983) . . . . . *passim*
Givhan v. *Western Line Consolidated School District*,
439 U.S. 410 (1979) 4
Gonzalez v. *Benavides*,
774 F.2d 1295 (5th Cir. 1985), *cert. denied*,
475 U.S. 1140 (1986) 14
Gray v. *Lacke*,
885 F.2d 399 (7th Cir. 1989), *cert. denied*,
494 U.S. 1029 (1990) 8, 14
Hall v. *Ford*,
856 F.2d 255 (D.C. Cir. 1988) 11, 14
Harlow v. *Fitzgerald*,
457 U.S. 800 (1982) 11
Johnston v. *Harris County Flood Control District*,
869 F.2d 1565 (5th Cir. 1989), *cert. denied*,
493 US. 1019 (1990) 14
Marshall v. *Allen*,
984 F.2d 787 (7th Cir. 1993) 9, 14
Morgan v. *Ford*,
6 F.3d 750 (11th Cir. 1993) 2, 3, 7, 14
Mt. Healthy City School District Board of Education v. *Doyle*,
429 U.S. 274 (1977) 4

O'Connor v. *Steeves*,
994 F.2d 905 (1st Cir.), *cert. denied*,
114 S. Ct. 634 (1993) 6, 10, 14
Pickering v. *Board of Education*,
391 U.S. 563 (1968) 4
Rankin v. *McPherson*,
483 U.S. 378 (1987) 3, 4
Rode v. *Dellarciprete*,
845 F.2d 1195 (3rd Cir. 1988) 11
Saulpaugh v. *Monroe Community Hospital*,
4 F.3d 134 (2d Cir. 1993), *cert. denied*,
114 S. Ct. 1189 (1994) 8, 9, 14
Wilson v. *UT Health Center*,
973 F.2d 1263 (5th Cir. 1992), *cert. denied*,
113 S. Ct. 1644 (1993) 14
Woodward v. *City of Worland*,
977 F.2d 1392 (10th Cir. 1992),
cert. denied 113 S. Ct. 3038 (1993) 6, 11
Wren v. *Spurlock*,
798 F.2d 1313 (10th Cir. 1986), *cert. denied*,
479 U.S. 1085 (1987) 14
Wulf v. *City of Wichita*,
883 F.2d 842 (10th Cir. 1989) 14
Yatvin v. *Madison Metropolitan School District*,
840 F.2d 412 (7th Cir. 1988) 14
Zamboni v. *Stamler*,
847 F.2d 73 (3rd Cir.), *cert. denied*,
488 U.S. 899 (1988) 11, 14

MISCELLANEOUS

Comment, *Beyond "Public Concern": New Free* Speech Standards for Public Employees, 57 U. Chi. L. Rev. 249 (1990) 6
James Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 Sociol. & Social Res. 3 (1989) 13
U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* (1988) 12

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

NO. 92-1722

JACQUELINE R. MORGAN,

Petitioner,

V.

JOHN S. FORD, ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND, *ET* AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

Amici are public interest advocacy organizations and labor unions dedicated to, *inter alia*, advancing the employment rights of women. They litigate and educate the public to improve equal opportunity for women and other historically

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, letters indicating the written consent of all parties to the filing of this brief are being lodged with the Court.

disadvantaged groups in employment, education, and other areas of public interest.[2]

This case is of great interest to *amici* because hostile environment harassment remains a potent barrier to women's equal access to the workplace. The decision below implicates both the First Amendment and the nation's commitment against sexual harassment in the workplace. It presents an important question of widespread practical importance that has split the circuits: Whether a public employee's speech that addresses a "matter inherently of public concern" and hence is entitled to First Amendment protection may lose that protection altogether because of the employee's personal stake in the subject of the speech.

Amici urge the Court to grant *certiorari* to the Eleventh Circuit to resolve this question.

STATEMENT OF THE CASE

Petitioner was employed as a correctional officer with the Georgia Department of Corrections from 1984 until 1988, when she resigned. While a public employee, she was subjected to acts of sexual harassment. *Morgan* v. *Ford*, 6 F.3d 750, 752, 756 (11th Cir. 1993). When a co-employee complained about the same subject and identified petitioner as a corroborating witness, she was questioned. She corroborated the other employee's complaints and also detailed the harassment she had suffered. Petitioner was advised to pursue her complaints through internal channels and she did so. *Id.* at 752. The department's investigators ruled against her

---

[2] Individual statements of interest of the *amici* are attached as Appendix A to this brief.

claim, after which she was subjected to retaliation for having complained. *Id.* at 752-3, 756.

Petitioner brought this action under Title VII seeking reinstatement and back pay. She also charged that her supervisors had violated her First Amendment rights by retaliating against her for her speech challenging their sexual harassment. The district court granted defendants' motion for summary judgment on all counts. The Eleventh Circuit reversed the district court on the Title VII claim but affirmed on the First Amendment claim.[3] It held that, although "the general subject of sexual harassment in the workplace is a matter of public concern," *id.* at 755 n.7, and thus ordinarily protected by the First Amendment, petitioner's speech was entitled to no First Amendment protection whatsoever. Construing *Connick* v. *Myers*, 461 U.S. 138 (1983), and *Rankin* v. *McPherson*, 483 U.S. 378 (1987), the court held that it "must . . . discern the purpose of the employee's speech — that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee." *Id.* at 754. Even the fact that petitioner corroborated her co-worker's account of sexual harassment did not result in First Amendment protection because, in the court's view, "the main thrust of her speech took the form of a private employee grievance." *Id.* at 755. The court thus used the "context and form" of petitioner's speech to take away the First Amendment protection that attached to it under *Connick* because of its content.

---

[3] Morgan's surviving Title VII claim does not vindicate her right to be free from punishment under color of law for exercising her First Amendment right to speak out on constitutional and statutory violations by State officials.

REASONS FOR GRANTING THE WRIT

A public employee has a First Amendment claim against her employer under 42 U.S.C. § 1983 when the employer has punished her for speech if (1) she spoke on a matter of public concern, (2) her interests in speaking outweighed the government's interest as employer in limiting that speech, and (3) her speech played a "substantial part" in the government's adverse actions against her. *Rankin* v. *McPherson*, 483 U.S. at 384; *Connick* v. *Myers*, 461 U.S. at 150; *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 416 (1979); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).[4]

The first step in this analysis — the only point involved in this case — is to determine whether the statement addresses a matter of "public concern" and thus warrants protection under the First Amendment. *Connick*, 461 U.S. at 146. On this issue, the courts of appeals are in hopeless disarray, primarily because the pertinent opinions of this Court lend themselves to conflicting interpretations.

I. *CONNICK* AND *RANKIN* ESTABLISH THAT SPEECH WHICH IS INHERENTLY OF PUBLIC CONCERN IS ENTITLED TO FIRST AMENDMENT PROTECTION.

Under *Connick*, speech by a public employee is entitled to First Amendment protection if it meets one of two tests. The first applies if the subject matter of the speech is "inher-

---

[4] She may be denied a remedy, however, if her employer proves that it would have taken the adverse action in the absence of her speech. *Mt. Healthy City School District Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977).

ently of public concern," even if communicated privately; race discrimination — and presumably sexual harassment — is such a subject. *Id.* at 148 n.8. When the subject is not *inherently* of public concern because of its *content*, the speech may nonetheless be entitled to protection because of its *form* or *context*. *Connick* involved a questionnaire that sought opinions of co-workers in a district attorney's office about how the office was run. The Court held that most of the questionnaire did not involve public concern, either because of its *content* or its *form* or *context*. But a question that dealt with whether employees "ever feel pressured to work in political campaigns" was held to raise a matter of public concern because of its *content*, even though its *form* and *context* were identical to the questions that did not raise a matter of public concern.

Rankin applied the "content, form, and context" analysis developed in *Connick*. The statement at issue was an expression of hope by an African American public employee that, if another attempt were made to assassinate President Reagan, it might succeed. Although the *content* of the statement was not entitled to First Amendment protection, the Court found that the statement was made in the *context* of a discussion of that president's policies and how they affected African Americans. Thus, the Court held that the employee's statement addressed a matter of public concern because it satisfied one of the three elements of the Connick test.

II. THE CIRCUITS APPLY CONFLICTING INTERPRETATIONS OF *CONNICK* AND *RANKIN*.

There is no suggestion in either *Connick* or *Rankin* that speech which, by content or subject matter alone, would be of public concern can lose First Amendment protection because of its context or form. Yet that is exactly what some

courts of appeals, including the Eleventh Circuit in this case, have held. Other circuits, however, have rejected this interpretation of *Connick* and *Rankin*.

Two courts of appeals have acknowledged this split in the circuits. In *O'Connor* v. *Steeves*, 994 F.2d 905, 913-14 & nn.4 & 5 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993), the court stated that "[t]he courts of appeals have adopted various approaches for determining whether a topic of employee speech is of 'public concern,'" with some circuits employing a "contextual" approach and others employing a "content-based" approach. See also *Woodward* v. *City of Worland*, 977 F.2d 1392, 1404 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 3038 (1993); Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. Chi. L. Rev. 249, 258-62 (1990) (describing the splintering of the circuits).

Under the "contextual" approach, followed by the Eleventh Circuit in this case, even if a public employee speaks on a matter that is inherently of public concern, the form and context of the statement may transform that speech into speech solely of private concern, contracting the scope of First Amendment protection. Under the "content-based" approach, no examination of form or context is made if the content or subject matter of the speech is inherently of public concern.

A. Three Circuits Hold That Speech Which Is Inherently of Public Concern May Lose Its First Amendment Protection Because of Its Form or Context.

The court in this case drew support for its analysis from the statement in *Connick* that there is no First Amendment

protection when "a public employee speaks *not* as a citizen upon matters of public concern, but *instead* as an employee upon matters *only* of personal interest." 461 U.S. at 147 (emphasis added). The court interpreted this statement to mean that an employee could speak only in one category or the other, *i.e.*, that if she speaks *as an employee* she cannot at the same time be speaking *as a public citizen*. Moreover, even if the employee speaks in both capacities, the court denies her First Amendment protection if the "main thrust" of the statement is made in her capacity as an employee. 6 F.3d at 755.

The court acknowledged that the subject matter of petitioner's speech — sexual harassment in a public workplace — was a matter of public concern, *id.* at 757, 755 n.7, a finding that is beyond dispute. Nevertheless, under its interpretation of *Connick*, the court held that petitioner's personal interest in the subject matter of her speech, as reflected in her failure to go public with her allegations, was sufficient to transform what otherwise was speech of public concern into speech of private concern. *Id.* at 755.[5] Moreover, it interpreted *Connick* as requiring it to discern the *primary* purpose of the speech.

The Seventh Circuit follows an identical interpretation of *Connick*. In *Callaway* v. *Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987), the court held that a sexual harassment victim who sought to end the harassment, but to do so quietly, had no First Amendment protection for her complaints because

---

[5] Even though the court acknowledged that speech does not lose its First Amendment protection simply because uttered in private, it appears to have given dispositive weight to petitioner's failure to publicize her plight. 6 F.3d at 755.

she was the victim of the harassment and did not seek to make the harassment public.[6] *Accord*, *Gray* v. *Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990) (complaints about sexual harassment by victim raise issues of only private concern).

The Second Circuit has recently reached the same conclusion, *i.e.*, that the "purpose" of speech can take away First Amendment protection from content that is of inherent public concern. In *Saulpaugh* v. *Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994), a public employee's supervisor conditioned her employment on her sleeping with him. When she refused and complained about his abuse, he retaliated against her. *Id.* at 139-40. The court held that

> "there is no indication that the plaintiff 'wanted to debate issues of sex discrimination,' that her suit sought 'relief against pervasive or systemic misconduct by a public agency or public officials,' or that her suit was 'part of an overall effort . . . to correct allegedly unlawful practices or bring them to public attention.'" *Id.* at 143.

Having found no evidence that the employee's complaints were aimed at stimulating a public debate, the court held them to be without First Amendment protection. *Id.*

Thus the Second and Seventh Circuits have now been joined by the Eleventh in holding that, even though the

---

[6] *Callaway* distinguished *Connick*'s holding on the political coercion question by characterizing that speech as "unconnected with her immediate personal interest in opposing her own work transfer."

content or subject matter of a public employee's speech raises a matter of inherent public concern, *Connick* requires them to look at the form and context of that speech as well. More important, they view *Connick* as requiring them to remove First Amendment protection from that speech if its form and context suggest a personal purpose — such as ending unconstitutional harassment or discrimination directed at the employee herself.[7]

---

[7] To be sure, not every decision that applies a full "content, form, and context" analysis to public employee speech on a matter of inherent public concern finds the speech to be unprotected.

For example, courts have held that men who complain of sex discrimination against women are protected because the content of the speech is of no personal consequence to the speaker. *See Marshall* v. *Allen*, 984 F.2d 787 (7th Cir. 1993) (speech by male employee in support of female victims of gender discrimination victims protected because he was not himself a victim of discrimination).

Others have held that, once discrimination has reached some unspecified level of pervasiveness in a public workplace, even the victims' complaints about it enjoy First Amendment protection. *E.g.*, *Auriemma* v. *Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1204 (1991) (speech by 18 white male officers complaining of demotion because of race was protected because it was not "run-of-the-mine single-plaintiff case"); *see also Saulpaugh*, 4 F.3d at 143 (distinguishing complaints about systemic sexual harassment from cases affecting only two employees). Those courts do not explain why sexual or racial harassment of a single employee as a condition of public employment does not offend the Constitution — and therefore the public — but harassment of five or ten does.

B. Other Circuits Hold That Speech Which Is Inherently of Public Concern Remains Protected No Matter What Its Form or Context.

In sharp contrast, other circuits have followed a completely opposite interpretation, holding that where the subject of the employee's speech is inherently of public concern, no examination of form or context need be made: The statement is entitled to First Amendment protection.

Illustrative is the First Circuit's decision in *O'Connor* v. *Steeves*, 994 F.2d 905 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993). It cited the very same language from *Connick* that the Eleventh Circuit cited, (see p. 6-7 above), *i.e.*, that there is no First Amendment protection when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." 461 U.S. at 147. But the court in *O'Connor* adopted the opposite interpretation from other courts:

> "Where a public employee speaks out on a topic which is clearly a legitimate matter of *inherent* concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the 'form and context' of the expression." 994 F.2d at 913-14 (emphasis supplied).

Only where the employee's speech does not raise an issue of public concern *on the basis of its content alone* will the court conduct the broader examination into the form and context of the statement to determine whether it is nonetheless entitled to protection under the First Amendment. *Id.*

The Tenth Circuit has followed this same interpretation. *Woodward* v. *City of Worland*, 977 F.2d 1392, 1404 (10th Cir. 1992) ("because the substance of [Question 11 in *Connick*] related to important societal and constitutional interests, it was held to be speech pertaining to a matter of public concern even though the context of the speech was to redress a personal grievance").[8] Likewise, the District of Columbia Circuit follows the "content" approach, having found the content of a public employee's speech to be of public concern without analyzing either its form or its context. *See Hall* v. *Ford*, 856 F.2d 255 (D.C. Cir. 1988).[9]

III. THIS CASE PRESENTS AN IMPORTANT ISSUE OF BROAD PRACTICAL IMPORTANCE.

The law applied in the Second, Seventh and Eleventh Circuits is destructive of more than First Amendment free-

---

[8] *Woodward* avoided ruling on the issue under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). 977 F.2d at 1404.

[9] The Third Circuit has taken an approach in the middle. While interpreting *Connick* as requiring a full "content, form, and context" analysis in every case, it has recognized that the Second and Seventh Circuits' focus on the purpose or motive of the speech at issue is inconsistent with *Connick* and *Rankin*. *Rode* v. *Dellarciprete*, 845 F.2d 1195, 1202 (3rd Cir. 1988) (to dismiss speech on racial animus as private "merely because [the employee] has a personal stake in the matter fetters public debate on an important issue because it muzzles an affected public employee from speaking out"); *Zamboni* v. *Stamler*, 847 F.2d 73 (3rd Cir.), *cert. denied*, 488 U.S. 899, 78 (1988) ("Were motivation rather than content dispositive, [*Connick*] would have had no reason to isolate the one question that was of public concern from all the others. Indeed, it is unlikely that any employee who lacks a personal interest in the subject that gives rise to the speech in question would file a lawsuit to vindicate his or her First Amendment rights").

doms; it is destructive of the nation's quest to rid public workplaces of sexual harassment and other discrimination. Under the standards adopted in those circuits, one who witnesses sexual harassment or other discrimination against a co-worker can complain about that conduct without fear of punishment for that speech. If the victim of the harassment complains, however, she can be punished with impunity. To put the issue in terms of the facts of *Connick*, had the employee there complained that she herself had been coerced into supporting a political candidate not of her choosing as a condition of state employment, these courts would hold that her speech raised no matter of public concern. Yet had she alleged that a co-worker had been coerced, her speech would raise a matter of public concern.

Constitutional proscriptions against political coercion or denial of equal protection never raise matters of solely private concern. They raise matters of inherently public concern. When a government official conditions non-exempt public employment on support of a political candidate, that official offends more than the affected employee. As this Court observed in *Connick*, he offends the public's interest in government service conditioned on merit rather than political loyalty. 461 U.S. at 149. Similarly, when a government official conditions public employment on provision of sexual favors or subjection to sexual or racial discrimination, he does not merely offend the victim of his discrimination. He offends both the public's interest in equal protection of the laws *and* its interest in government service based on merit.

Sexual harassment is widespread in public, as well as private, workplaces. *See, e.g.*, U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* (1988). It is, unfortunately, also widely unreported.

See, e.g., James Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 Sociol. & Social Res. 3, 5 (1989) (reporting that fewer than ten percent of sexual harassment victims make formal complaints). So long as harassment goes unreported, it continues unchecked. Many public employers have established internal complaint procedures that encourage victims of harassment to come forward with their concerns informally. If allowed to function, these complaint procedures will increase reporting of harassment, speeding the process of eradicating sexual harassment from public workplaces. If public employees cannot use these procedures without fear of retaliation, both their First Amendment and Equal Protection rights will be violated.

There can be no question that the decision in this case would have come out exactly the opposite way if the case had been filed in the First Circuit or the District of Columbia. Nor is there any doubt that the Second and Seventh Circuits would have reached the same conclusion as the court below on the facts of this case. Thus, mere accident of residence determines whether a public employee who complains internally about unlawful discrimination against her is engaging in speech that is protected by the First Amendment.

More than a dozen appellate decisions have addressed public employee speech concerning constitutional or statutory violations by public officials — matters of inherent public

concern — in the last ten years.[10] Obviously a far greater number of such claims were unappealed or settled or even unfiled. This means that the disparity in the circuits is clearly a recurring and serious problem for public employees and must be corrected. Petitioner's case, which presents the question cleanly, is an appropriate vehicle for issuing that guidance.

---

[10] *See Gonzalez* v. *Benavides*, 774 F.2d 1295, 1301 (5th Cir. 1985), *cert. denied* 475 U.S. 1140 (1986); *Wren* v. *Spurlock*, 798 F.2d 1313 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *Callaway* v. *Hafeman*, 832 F.2d 414 (7th Cir. 1987); *Yatvin* v. *Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988); *Zamboni* v. *Stamler*, 847 F.2d 73 (3rd Cir.), *cert. denied*, 488 U.S. 899 (1988); *Brawner* v. *City of Richardson*, 855 F.2d 187 (5th Cir. 1988); *Hall* v. *Ford*, 856 F.2d 255 (D.C. Cir. 1988); *Johnston* v. *Harris County Flood Control District*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Wulf* v. *City of Wichita*, 883 F.2d 842 (10th Cir. 1989); *Gray* v. *Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990); *Bryson* v. *City of Waycross*, 888 F.2d 1562 (11th Cir. 1989); *Breuer* v. *Hart*, 909 F.2d 1035 (7th Cir. 1990); *Auriemma* v. *Rice*, 910 F.2d 1449 (7th Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1204 (1991); *Wilson* v. *UT Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1644 (1993); *Marshall* v. *Allen*, 984 F.2d 787 (7th Cir. 1993); *O'Connor* v. *Steeves*, 994 F.2d 905, 914 (1st Cir.), *cert. denied* 114 S. Ct. 634 (1993); *Saulpaugh* v. *Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994); *Morgan* v. *Ford*, 6 F.3d 750 (11th Cir. 1993).

CONCLUSION

For the reasons stated above, the Court should grant the petition for *certiorari.*

Respectfully submitted,

JUDITH L. LICHTMAN
DONNA R. LENHOFF
HELEN L. NORTON
WOMEN'S LEGAL DEFENSE FUND
1875 CONNECTICUT AVE., N.W.
SUITE 710
WASHINGTON, D.C. 20009
(202) 986-2600

JOHN VANDERSTAR*
SANDRA L. SPEAR
COVINGTON & BURLING
1201 PENNSYLVANIA AVE., N.W.
P.O. BOX 7566
WASHINGTON, D.C. 20044
(202) 662-6000

COUNSEL FOR AMICI CURIAE

MAY 31, 1994

*COUNSEL OF RECORD

APPENDIX A

The Women's Legal Defense Fund (WLDF) is a non-profit national advocacy organization founded in 1971 to advance the rights of women in the areas of work and family. WLDF represents women and men challenging barriers to sexual equality, particularly those in employment. It does so through litigation of significant cases, public education, and lobbying for improvements in the equal employment opportunity laws and their enforcement.

The American Federation of Government Employees, AFL-CIO (AFGE), represents more than 700,000 federal employees in sixty-five agencies of the federal government and the District of Columbia. As the largest union of public sector employees working for the federal government, where some 20,000 complaints of discrimination are filed each year, AFGE is concerned that First Amendment protections reach statements produced in internal agency investigations.

The American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) is a labor organization representing approximately 1.5 million working men and women throughout the United States, Puerto Rico, and Panama. AFSCME is the largest union of public employee and health care workers in the country. Over one million of these workers are employed by state and local governments, with several thousand of these government employees working in the state of Georgia. Throughout the country, AFSCME develops, initiates, assists, and defends litigation in state and federal courts as well as before administrative agencies addressing questions of labor relations, civil rights, and due process under the law. AFSCME labors to protect the rights of workers both on and off the job. AFSCME is

committed to ensure equality of rights for all workers both on and off the job. AFSCME is committed to ensure equality of rights for all workers and to oppose discrimination against workers based on race, color, creed, national origin, age, political belief, religion, gender, disability, or sexual orientation.

The American Federation of Teachers, AFL-CIO (AFT), is a national labor union affiliated with the AFL-CIO. The AFT represents over 800,000 members who work in public elementary and secondary schools, community colleges and universities, state government, and health care. The majority of AFT members work as teachers and teaching assistants in public elementary and secondary schools.

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

The Coalition of Labor Union Women (CLUW) is America's only national organization for union women. Not a union itself, CLUW strives to make organized labor — and the public in general — more sensitive to the needs of working women and their families. CLUW has 75 chapters nationwide and over 20,000 members representing more than 60 unions. Since 1974, CLUW has fought for decent wages and working conditions, and a stronger voice for workers in society.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a twenty year history of representing the interests of working women in the courts, legislatures, and public education campaigns. Since its early days, ERA has worked to end sexual harassment both through litigation and public policy initiatives. ERA represented plaintiff in the first case in the Ninth Circuit to find sexual harassment a violation of Title VII. (*Miller* v. *Bank* of America, 600 F.2d 211 (9th Cir. 1979).) In addition, ERA advises hundreds of women each year through its advise and counseling "hot line" regarding their legal right to be free from this invidious form of discrimination and provides technical assistance to scores of attorneys each year who are representing clients with sexual harassment claims. Our experience has shown that it is vital that women be encouraged to speak out about sexual harassment in order to eradicate it.

Mexican American Women's National Association (MANA), is a national Latina Organization founded by Mexican American Women in 1974. *Morgan* v. *Ford* provides an opportunity for the court to provide clarity on an important issue regarding First Amendment issues in cases of sexual harassment. MANA's interest in the matter is to ensure that all individuals will be free of retaliation in coming forth to testify in such cases — that are under reported in our society.

The National Council of Jewish Women (NCJW), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for

women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 100,000 members in over 500 communities around the country. Based on NCJW's National Resolutions that include working for "employment policies which safeguard the dignity, rights, benefits, health and safety of all workers," we join this brief in support of a petition for certiorari.

The National Education Association (NEA) is a nation-wide labor organization with a current membership of more than 2 million persons, the vast majority of whom are employed by public school districts, colleges and universities. One of the principal purposes of NEA is to safeguard the constitutional rights of its members in matters relating to their employment.

The National Organization for Women (NOW) is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically seif-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination against women.

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents approximately

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents approximately 150,000 federal employees nationwide. In addition to serving as their collective bargaining representative, NTEU frequently represents employees at the workplace and in administrative and judicial proceedings seeking to vindicate their rights under numerous anti-discrimination laws, including those that prohibit sexual harassment. NTEU, accordingly, has a strong interest in promoting the enforcement of those laws and protecting the rights of public employees under the First Amendment to speak freely on matters of public concern.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of woman's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Robinson* v. *Jacksonville Shipyards, Inc.*, 760 S. Supp. 1486 (M.D. Fla. 1991), *appeal pending* (11th Cir. argued Dec. 2, 1992), and *Townsend* v. *Indiana University*, No. 92-2869 (7th Cir. argued April 6, 1993).

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization dedicated to protecting the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding 1978, the NWLC has been devoted to eradicating sex discrimination in the workplace and has focused particular attention on the problem of sexual

harassment. The NWLC believes that sexual harassment in the workplace is an issue of significant public concern and has participated as counsel and as *amicus curiae* in cases throughout the country in efforts to ensure the availability of legal remedies for victims of sexual harassment. The NWLC is also active in efforts to educate employers and the general public about the widespread problem of sexual harassment in the workplace.

Wider Opportunities for Women (WOW) is a non-profit women's employment organization committed to working nationally and locally in its home community of Washington, D.C. to achieve economic independence and equality of opportunity for women and girls. WOW helps women learn to earn, with programs stressing literacy, technical, and non-traditional skills, and career development. Sexual harassment remains one of several barriers that women encounter in the workplace. In order for WOW to achieve its goals, working environments must be made free of sexual harassment and all other forms of discrimination.

Women Employed is a national membership association of 2000 working women based in Chicago. Since 1973, the organization has assisted thousands of working women with sex discrimination problems, analyzed equal opportunity policies, monitored the performance of equal opportunity enforcement agencies, and developed proposals for improving enforcement efforts. Women Employed strongly believes that sexual harassment in the workplace is one of the chief barriers to achieving equal opportunity and economic equity for working women.

The Women's Law Project (WLP) is a non-profit, feminist legal advocacy organization located in Philadelphia. Founded

in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past twenty years, WLP's activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of sexual harassment from the workplace and the availability of strong and effective legal remedies for harassment and other forms of sex discrimination. WLP believes that the decision below will deter victims of sexual harassment from reporting and seeking redress for harassment in the workplace.

The Women's Policy Group (WPG) is a non-profit corporation of individuals working to the personal, family and work lives of Georgia's women and girls. The WPG advocates equal rights for all women by enforcing anti-discrimination laws and by promulgating new remedies that would provide legal bases to end the widespread discrimination confronting women. The WPG advocates on these issues in various forums: legislative, administrative and judicial.

Women Work! The National Network for Women's Employment is a membership organization, rooted in the Displaced Homemakers Movement, dedicated to empowering women from diverse backgrounds and assisting them to achieve economic self-sufficiency through job readiness, education, training, and/or employment. In addition to individuals throughout the country, Network members include more than 1,000 education, training, and employment programs. The Network is committed to on-going, comprehensive public education to build awareness of the needs of and support for mid-life and older displaced homemakers and

other women entering, re-entering, and training for the workforce. The Network collects data, disseminates information, provides training and technical assistance and acts as a communication link to programs, agencies and educational institutions. The Network affects public policy by working with lawmakers, business leaders and labor to create and strengthen programs and policies for women.